Supreme Court of the United States

OCTOBER TERM, 1956

No. 117

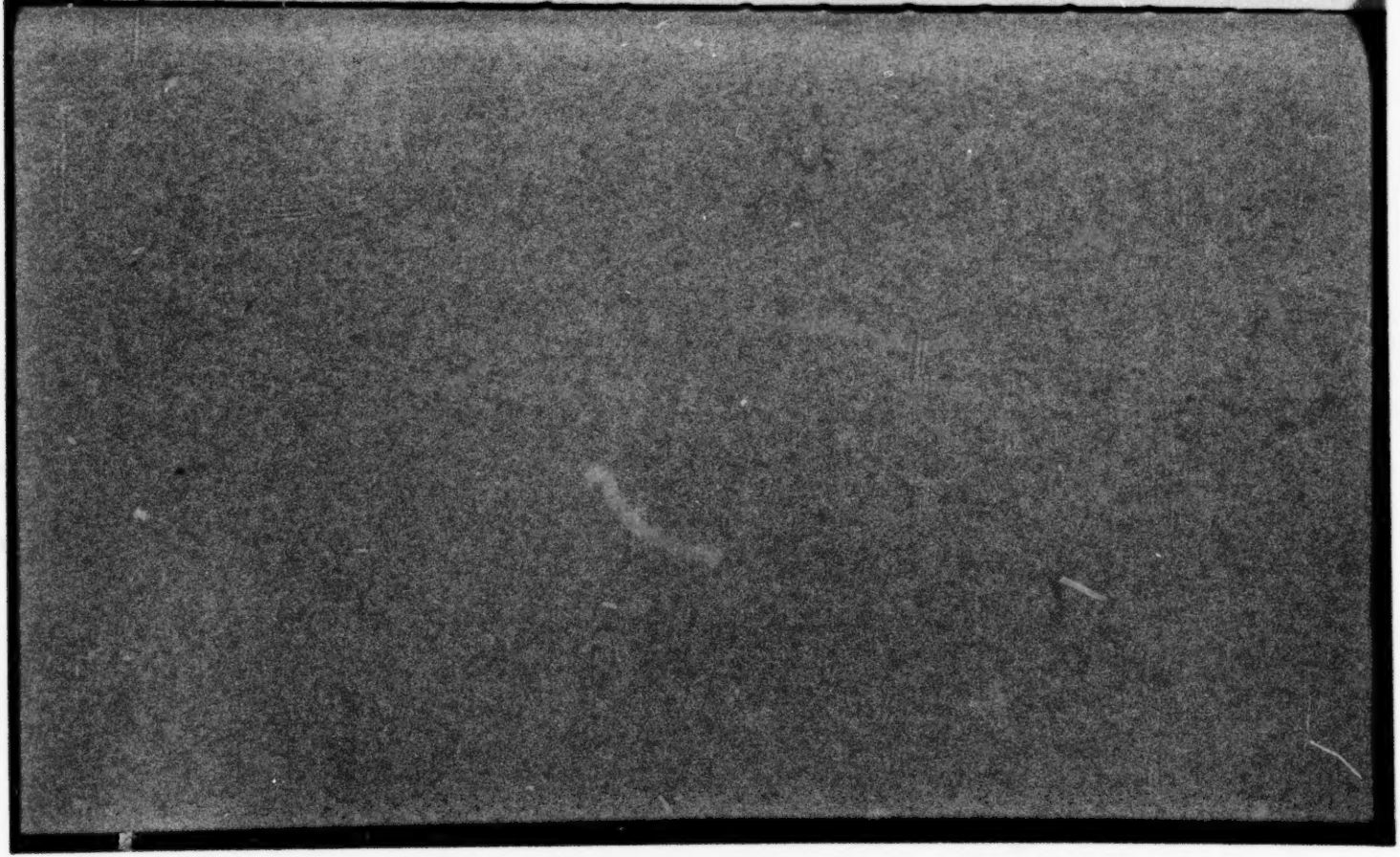
DANIEL MICHAEL McDONALD, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

(28,307)



( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No.

DANIEL MICHAEL McDONALD, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 20, 1928

[a-1] [Captions omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 235, Naturalization Docket

In re Appeal of DANIEL MICHAEL MACDONALD from Order Denying Petition for Naturalization

[fol. 2] PETITION FOR NATURALIZATION—Filed Dec. 22, 1926

No. 87157

U. S. Department of Labor, Naturalization Service, United States of America

To the Honorable the District Court of the United States for the District of Massachusetts:

The petition of Daniel Michael Macdonald, hereby filed, respectfully showeth:

First. My place of residence is 172 Maple Street, Malden, Massachusetts.

Second. My occupation is master mariner.

Third. I was born on the 25th day of August, anno Domini 1877, at Victoria, Nova Scotia.

Fourth. I emigrated to the United States from Callao, Peru, on or about the 3d day of September, anno Domini 1920, and arrived in the United States, at the port of New York, N. Y., on the 17th day of September, anno Domini 1920, on the vessel Ebro.

Fifth. I declared my intention to become a citizen of the United States on the 30th day of November, anno Domini 1921, at Boston, Mass., in the District Court of the United States.

Sixth. I am married. My wife's name is Mary; she was born on the — day of ——, anno Domini at Newfoundland, and now resides with me. I have one child, and the name, date and place of birth and place of residence of each of said children is as follows:

Donald, 9, July, 1917, born in Halifax, lives in Malden.

Seventh. I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to George V., King of the United [fol. 3] Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas, Emperor of India, of whom at this time I am a subject, and it is my intention to reside permanently in the United States.

Eighth. I am able to speak the English language.

Ninth. I have resided continuously in the United States of America for the term of five years at least immediately preceding the date of this petition, to wit, since the 17th day of September, anno Domini 1920, and in the State of Massachusetts, continuously next preceding the date of this petition, since the 18th day of September, anno Domini 1920, being a residence within this State of at least one year next preceding the date of this petition.

Tenth. I have not heretofore made petition for citizenship to any court.

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the Department of Labor, together with my affidavit and the affidavits of the two verifying witnesses thereto, required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

Daniel Michael Macdonald.

Declaration of Intention No. 123716 and Certificate of Arrival from Department of Labor filed this 23d day of December, 1926.

Affidavits of Petitioner and Witnesses

United States of America,
District of Massachusetts, ss:

The aforesaid petitioner, being duly sworn, deposes and says that he is the petitioner in the above-entitled proceedings; that he has read the foregoing petition and knows the contents thereof; that the said petition is signed with his full, true name; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Daniel Michael MacDonald.

[fol. 4] Robert H. Harris, occupation, clerk, residing at Allston, Massachusetts, and Edward J. Gough, occupation, accountant, residing at Newtonville, Massachusetts, each being severally, duly, and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known said Macdonald, the petitioner above mentioned, to have resided in the United States continuously immediately preceding the date of filing his petition, since the — day of ——, anno Domini 1920, and in the State in which the above-entitled petition is made continuously since the — day of ——, anno Domini, 1920, and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and that the petitioner is in every way qualified, in his opinion, to be admitted a citizen of the United States.

Robert H. Harris, Edward J. Gough.

Subscribed and sworn to before me by the above-named petitioner and witnesses in the office of the clerk of said court at Boston, Mass., this 22d day of December, anno Domini 1926. Joseph Dewan, Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT

DECLARATION OF INTENTION

No. 123,716

United States Department of Labor, Naturalization Service

Invalid for all purposes seven years after the date hereof

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

IN THE DISTRICT COURT OF THE UNITED STATES

I, Daniel Michael Macdonald, aged 44 years, occupation master mariner, do declare on oath that my personal description is: Color white, complexion medium, height 6 feet 1 inch, weight 246 pounds, color of hair brown, color of eyes blue, other visible distinctive marks scar on right hand. I was born in Victoria County, Nova Scotia, on the 25th day of August, anno Domini 1877; I now reside at 16 Con- [fol. 5] necticut Ave., Somerville, Massachusetts. I emigrated to the United States of America from Callao, Peru, on the vessel Ebro; my last foreign residence was said Victoria County; I am married; the name of my wife is Mary; she was born at Newfoundland and now resides with me. It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to George V, King of Great Britain and Ireland, of whom I am now a subject; I arrived at the port of New York in the State of New York, on or about the 17th day of September, anno Domini 1920; I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein: So help me God.

Daniel Michael Macdonald

Subscribed and sworn to before me in the office of the clerk of said court at Boston, Mass., this 30th day of November anno Domini 1921. Arthur D. Grandison, Deputy Clerk of the District Court of the United States. (Seal.)

This cause was thence continued to the present March Term, A. D. 1927, when, to wit, April 11, 1927, said cause comes on to be heard on the aforementioned petition and is fully heard by the court, and the following order of court is entered, denying the petition:

IN UNITED STATES DISTRICT COURT

ORDER DENYING PETITION

Upon consideration of the petition of Daniel Michael Macdonald and the motion of District Director of Naturalization for the United States in open court this eleventh day of April, 1927, it appearing that for the reason that applicant since his arrival in the United States has served on vessels other than American registry, the said petition is hereby denied

James A. Lowell, Judge.

From the order denying petition for naturalization [fol. 6] Daniel Michael Macdonald claims an appeal to the United States Circuit Court of Appeals for the First Circuit, and bond having been waived, said appeal is allowed accordingly.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT—Filed April 11, 1927

Upon hearing the above petition for naturalization, the following facts are found:

Daniel Michael Macdonald, the petitioner for naturalization, was born in Big Bras d'Or, Nova Scotia, in the Dominion of Canada, on the twenty-fifth day of August 1877, a subject of George V. King of Great Britain; that he has maintained his residence continuously in the United States and in the Commonwealth of Massachusetts since September 17, 1920, and has always behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same, and is in every respect eligible and qualified to become a citizen of the United States except that dur-

ing the said period of his residence in the Commonwealth of Massachusetts his employment has compelled him to sail from the port of Boston to various ports in Central America and return to the port of Boston as master of vessels registered under the laws of the Kingdom of Great Britain.

It is further found that the said Daniel Michael Macdonald entered the United States at the port of New York as a passenger, September 17, 1920, on the steamship Ebro of the Pacific Steam Navigation Company from Callao, Peru; that he paid the head tax imposed on aliens by the United States Government to the Pacific Steam Navigation Company as is evidenced by a receipt in the sum of eight dollars ($8) dated Callao, Peru, September 3, 1920; that since his arrival in the United States at the port of New York he has been continuously in the service of the United Fruit Company, a corporation organized under the laws of the State of New Jersey having its general offices in the City of Boston, Commonwealth of Massachusetts, as the master of one of its steamships, including at different [fol. 7] times the steamship Macabi, the steamship Maravi and the steamship San Benito, all voyages commencing and ending at United States ports, principally at the port of Boston; that the above named steamships are of British registry; that his wife joined him in the City of Boston on September 1, 1921; that thereupon he established his residence at No. 16, Connecticut Avenue, Somerville, Massachusetts, and has since then continuously maintained his residence in the vicinity of Boston for himself, his wife and his child; that the furnishings in such residence are owned by him; that his child is being educated in the schools of the Commonwealth of Massachusetts; that since his entry in the United States he has annually paid a Federal income tax, an income tax to the Commonwealth of Massachusetts and all other local taxes.

It is further found that the said Daniel Michael Macdonald filed a declaration of his intention to become a citizen of the United States in the District Court of the United States for the District of Massachusetts, at Boston, on November 30, 1921, according to the provisions of Subdivision 1 of Section 4 of the Act of Congress of June 29, 1906, as amended, and there was issued to him declaration form No. 123,716; that on December 22, 1926, he filed his

petition for naturalization in the District Court of the United States for the District of Massachusetts according to the provisions of subdivision 2 of Section 4 of said Act of Congress, which said petition was numbered 87,157; that he offered to declare in open court under oath that he will support and defend the Constitution and laws of the United States, renouncing all allegiance and fidelity to any foreign sovereignty according to the provisions of Subdivision 3 of said Act of Congress; that he offered two witnesses, citizens of the United States, to the fact of his residence in the United States and the Commonwealth of Massachusetts for more than five years immediately preceding the date of his petition, according to the provisions of Subdivision 4 of Section 4 of the said Act of Congress; that said declaration of intention conformed in every way to the law in force at the time of the making thereof and that said petition for naturalization was in manner and form correct and sufficient.

[fol. 8] Order

As the said Daniel Michael Macdonald, subsequent to establishing his residence in the Commonwealth of Massachusetts, has served on vessels other than vessels of American registery and as Subdivision 7 of Section 4 of the Act of Congress of June 29, 1906, as amended, known as the naturalization laws, provides that service on vessels other than of American registery shall not be considered as residence for naturalization purposes, it is ordered that his said petition for naturalization be denied.

James A. Lowell, United States District Judge.

In United States District Court

Petition for Appeal and Order Allowing Same—Filed June 10, 1927

To the Honorable the District Court of the United States for the District of Massachusetts:

And now comes Daniel Michael Macdonald, petitioner in the above entitled cause, and claims an appeal and prays

that the same may be allowed to the United States Circuit Court of the Appeals for the First Circuit from the decision in said cause of the District Court of the United States for said District denying the said petition.

By his Attorney, William K. Jackson.

June 10, 1927.—Appeal allowed, bond being waived. James A. Lowell, United States District Judge.

In United States District Court

Assignment of Error—Filed June 10, 1927

To the Honorable the District Court of United States for the District of Massachusetts:

Now appears the said petitioner and alleges errors in the said proceedings before this court and the judgment herein and the rulings of said court and assigns as follows:

[fol. 9] (1) That the court erred in ruling that petitioner had not established a residence for naturalization purposes under the Act of Congress of June 29, 1906, as amended.

(2) That the court erred in ruling that Subdivision 7 of Section 4 of the Act of Congress of June 29, 1906, as amended, or any language therein, is applicable to petitioner.

(3) That the court erred in ruling that Subdivision 7 of Section 4 of the said Act of Congress of June 29, 1906, as amended, or any language therein is applicable to a declaration of intention and petition filed under the general provisions of Subdivisions 1, 2, 3 and 4 of Section 4 of the said Act of Congress of June 29, 1906, as amended.

(4) That the court erred in denying said petition.

By His Attorney, William K. Jackson.

Citation, in usual form, showin service on John H. Schenk, omitted in printing.

[fol. 10] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 11] In United States Circuit Court of Appeals for the First Circuit, October Term, 1927

No. 2143

Daniel Michael Macdonald, Petitioner, Appellant,

v.

United States of America, Respondent, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Johnson and Anderson, JJ.

Opinion—December 2, 1927

Johnson, Circuit Judge:

On December 22, 1926, Daniel Michael Macdonald filed in the District Court of the United States for the District of Massachusetts a petition for naturalization, in which he alleged that he came to the United States from Callao, Peru, on or about September 3, 1920, arriving at the port of New York September 17, 1920; that he had declared his intention to become a citizen of the United States on November 30, 1921; that he had resided continuously in the United States for the term of five years at least immediately preceding the date of his petition, and in the Commonwealth of Massachusetts continuously for one year.

From the findings of fact reported it appears that the petitioner, since his arrival in the United States, has been continuously in the service of the United Fruit Company, a [fol. 12] corporation organized under the laws of the state of New Jersey, having its general offices in the city of Boston, in the Commonwealth of Massachusetts, as the master of several of its steamships, all of which were of British registry; that his voyages on all of such steamships commenced and ended at United States ports, principally at the port of Boston; that his wife joined him in

the city of Boston September 1, 1921, and thereupon he established his residence in Somerville, Massachusetts, and has since continuously maintained his residence in the vicinity of Boston wth his wife and child.

His petition for naturalization was denied on the ground that he had served as master of vessels of foreign registry continuously since his entrance into the United States and therefore could not secure residence in the United States for naturalization purposes during the time of such service because of the provisions of Subdivision 7 of Section 4 of the Act of June 29, 1906, as amended by the Act of May 9, 1918.

By the original Act Congress defined in detail the requirements for naturalization, and in Subdivision 4 of Section 4 of the Act provided as follows:

"4th. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State of Territory where such court is at the time held one year at least."

May 9, 1918, Congress added by amendment seven additional subdivisions of Section 4, dealing in Subdivision 7 with the naturalization of Filipinos, Porto Ricans not citizens of the United States, and any alien of the age of twenty-one years and upward who has enlisted or shall hereafter enlist in the armies of the United States, or in United States Navy, or Marine Corps, or United States Coast Guard, or serve for three years on board of any vessel of the United States Government, or for three years or board of merchant or fishing vessels of the United States of more than twenty tons burden, and provided that they might be admitted to citizenship without proof of the required five years' continuous residence in the United States; and further provided:

[fol. 13] "That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry."

It is claimed that this prohibition applies only to the aliens with which the amendment was dealing. The proviso is not limited by terms to such aliens, but is general. It is evident that Congress, in the passage of this amendment, intended to reward aliens who had enlisted in the Army and Navy of the United States and been honorably discharged, and also to encourage service upon merchant vessels or fishing vessels of the United States. That Congress had in mind the latter purpose is evidenced by the 8th Subdivision, which is as follows:

"8th. That every seaman, being an alien, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served three years upon such merchant or fishing vessels of the United States, be deemed a citizen of the United States for the purpose of serving on board any such merchant or fishing vessel of the United States, anything to the contrary in any act of Congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such after the filing of his declaration of intention to become such citizen."

The chairman of the House Committee on Immigration and Naturalization, in the report made by him to the House of Representatives on May 3, 1918, in speaking of this 7th Subdivision, said:

"The subdivision also prohibits the naturalization of aliens serving on vessels of foreign registry, this construction having been maintained by some courts in view of the provisions of Section 2174, which recognizes service of aliens on vessels of American registry."

Subdivision 7 has been considered by two District Courts. In In re Nicolich, 17 Fed. (2d) 611, a case in the Eastern [fol. 14] District of Louisiana, it was held that the proviso in Subdivision 7 applied only to the classes of aliens enumerated in the amendment. This cannot be so, because one of these classes consists of aliens who have "served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States," and does not include aliens who have served upon vessels of foreign registry.

The proviso, by its terms, applies to aliens serving on vessels of foreign registry, and excludes such service from being considered as residence for naturalization purposes. It therefore has no application to aliens who have served upon vessels of American registry, and Congress must have intended it to apply to the five years' continuous residence required by the Act. In Petition of MacKinnon, 21 Fed. (2) 445, the District Court of the Eastern District of New York had the same proviso under consideration and affirming its decision in United States v. Habbick, 287 Fed. 593, held that, although the petitioner had a wife and two children living in Brooklyn, where they had lived continuously for more than the five-year period, as the petitioner had been the master of vessels flying either the British or Canadian flag for at least four years of the five years immediately preceding the filing of his petition, his residence was not such as to entitle him to naturalization. The same petitioner had filed a prior petition in the Supreme Court of the State of New York, which was denied on the same ground, and upon an appeal being taken to the appellate division the order of the Supreme Court was unanimously affirmed, the court saying:

"A master of vessels sailing under foreign flags is to some extent acting under the laws of and subject to the officials of a foreign country. Hence, the five years' residence necessary for naturalization cannot be computed from sea service on foreign vessels, even if the applicant's wife and children reside in this country."

We think the interpretation placed upon Subdivision 7 of Section 4 of the New York court is correct.

The order of the District Court is affirmed.

[fol. 15] In United States Circuit Court of Appeals

Dissenting Opinion

Anderson, J. (dissenting):

Macdonald, born in Nova Scotia in 1877, has, since 1921, lived with his wife and child in Somerville, Mass., where his child is in the public school. In every aspect except

one he is concededly entitled to citizenship. But he is a captain of a United Fruit steamship. This is a Boston enterprise which,—for reasons unknown to me and probably immaterial if known,—has its steamships under British registry. Macdonald's service,—in and out of American ports but in a ship under British registry,—is held to disentitle him to citizenship, although he has had his home in Massachusetts for more than five years. I cannot believe that Congress intended any such result to accrue from the proviso at the end of the long subdivision 7th of the Act of May 9, 1918,—40 Stats. 548. In construe that Act as did Judge Burns in the Nicolich case, 17 Fed. (2d). The Act was in essence war legislation, worked out after we had been a year involved in the great World War. This sub-division gives Filipinos, Porto Ricans, aliens enlisting in the army, the navy, the marine corps, the coast-guard, or serving in our merchant marine (seven classes in all) a three-year probative term in these respective services, instead of "the required five year residence within the United States."

After lengthy procedural provisions in this 7th sub-division, there is a caveat, near the end, reading—"provided further that service of aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry." This proviso is held to bar the applicant. But the five year period remains generally applicable. What was residence before is residence now. United States v. Habbick, 287 Fed. 593.

To my mind, all that this proviso means is that the three-year provision shall not apply if the service be on vessels of foreign registry. Read in context: "during service [fol. 16] upon vessels of foreign registry" obviously means "through such service upon vessels of foreign registry." The proviso has no bearing on rights under the five-year requirement. It simply limits the new grant, grounded on war service, to American registry. It offers a reward for three years of the designated dangerous war service; it does not penalize sea service under the flag of nations with which we were then in close association in the great war,

by taking away naturalization rights accorded residents aliens for more than a century. Cf. Act April 14, 1802, 2 Stats. 153. Statutory History of Naturalization, Appendix B, in Report to the President by the Commission on Naturalization, 69th Congress, First Session. Doc. No. 46.

At one time the statute prohibited any absence from the United States, but this prohibition was repealed in 1848. 9 Stats. 240.

There is nothing new in recognizing war service and service in the merchant marine as a ground for shortening the probative period. See the Act of July 17, 1862, 12 Stats. p. 597. Act of June, 1872, 17 Stat. p. 268, now R. L. s. 2174.

The eighth sub-division, quoted in the majority opinion, simply offers further reward and protection to alien declarants serving on vessels of the United States for three years; but I cannot see that it lends the slightest support to the theory of my brethern that the quoted proviso from the seventh sub-division is to be extended into a general taboo upon sea service under foreign registry.

[fol. 17] In United States Circuit Court of Appeals

[Title omitted]

Petition for Rehearing

The petitioner-appellant respectfully submits that the opinion rendered by this court on December 2, 1927, is based upon a misapprehension of the substance of Mr. Justice Campbell's opinion in In re Petition of MacKinnon, 21 Fed. (2d) 445. This decision was not published at the time of petitioner-appellant's hearing, and petitioner-appellant therefore did not have the opportunity of calling this court's attention to the basis of Mr. Justice Campbell's opinion. It is submitted that——

1. In denying MacKinnon's petition, the United States District Court for the Eastern District of New York did not hold that the proviso clause of subdivision 7 of section 4 was applicable to petitions for citizenship under the general provisions of the Naturalization Laws and deny the petition because of that fact, as in the case of petitioner-

[fol. 18] appellant. This proviso clause was only incidentally mentioned. The basis of the decision was stated by Mr. Justice Campbell to be the same as in his opinion in United States v. Habbick, 287 Fed. 593, and as in Mr. Justice Callaghan's opinion in In re Wills, 169 N. Y. Supp. 261. The opinion in United States v. Habbick states that Habbick returned to his native country and there shipped on foreign registered vessels. He therefore relinquished his residence (domicile). Mr. Justice Campbell stated that, had he shipped on vessels from United States ports while a resident of the United States, and returned to United States ports, he would have been entitled to citizenship. In In re Willis the opinion states that Willis was married prior to coming to the United States in 1910, but did not bring his wife to the United States for over five years. The court therefore held that his being ashore in the United States was a matter of convenience and without any bona-fide intention of becoming a resident. Willis had never established a bona fide domicile in the United States.

2. Mr. Justice Campbell's opinion in the MacKinnon case must be examined and construed in the light of the facts to which it is applicable. There is no statement in the MacKinnon opinion which indicates that the facts are materially different from the facts in the Habbick case. There is nothing to show that MacKinnon actually established a bona fide residence (domicile) in the United States and thereafter shipped from United States ports and returned to United States ports. On the contrary, the opinion states that MacKinnon arrived in the United States on January 6, 1912, and that he was master of the British steamship "Mayaro" from January 6, 1912, to September 14, 1915, thereby indicating that he arrived in the United States on that vessel. The fact is that MacKinnon shipped on the steamship "Mayaro" in a foreign country and arrived in the United States January 6, 1912, as first officer of that steamship. The naturalization records show that he has never paid a head tax. Only on this basis can Mr. Justice Campbell reconcile his decision in the MacKinnon case [fol. 19] with his statement in the Habbick opinion that Habbick would have been entitled to admission to citizenship if he had shipped from and returned to United States ports. If, as stated in this court's opinion, this court agrees

with Mr. Justice Campbell's decision, it is submitted this court should reverse the District Court's decision which denied petitioner-appellant's application for citizenship.

Daniel Michael MacDonald, by His Attorney, William K. Jackson.

The petitioner-appellant therefore prays that the opinion rendered herein be withdrawn and a further hearing granted.

I hereby certify that the foregoing petition is in my opinion well founded, and that it is not intended for delay.

William K. Jackson.

On November 2 and 3, 1927, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

Thereafter, to wit, on December 2, 1927, the opinion of the court (page 11) and a dissenting opinion (page 15) were filed and the following Final Decree was entered:

In United States Circuit Court of Appeals

Final Decree—December 2, 1927

This cause came on to be heard November 2 and 3, 1927, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel:

Upon consideration whereof, It is now, to wit, December 2, 1927, here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court,

Arthur I. Charron, Clerk.

[fols. 30-24] Thereafter, to wit, on December 31, 1927, a petition for rehearing (page 17) was filed by appellant, and on January 12, 1928, the following Order of Court was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING REHEARING—January 12, 1928

No judge who concurred in the decree entered December 2, 1927, desiring a rehearing, It is ordered that the petition for rehearing filed December 31, 1927, be, and the same hereby is, denied.

By the Court,

Arthur I. Charron, Clerk.

Thereafter, to wit, February 4, 1928, mandate was stayed till further order of court.

Certificate of Arthur I. Charron, Clerk of U. S. C. C. A., First Circuit to foregoing transcript omitted in printing.

[fols. 25 & 26] IN SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME—Filed April 10, 1928

It is hereby ordered that the time within which application for a writ of certiorari directed to the Circuit Court of Appeals for the First Circuit and the filing of the record in the above entitled cause may be made to this Court is extended for a period of twenty days from and after April 11, 1928, to include the 1st day of May, 1928.

Oliver Wendell Holmes, Associate Justice Supreme Court of the United States.

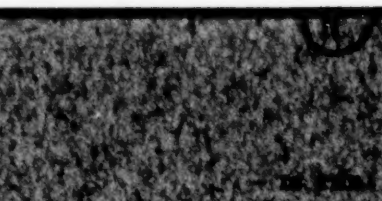
[fol. 27] [File endorsement omitted.]

Endorsed on cover: File No. —. U. S. Circuit Court of Appeals First Circuit. Term No. —. Daniel Michael McDonald, Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed —, 1928. File No. —.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 28, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



FILED
APR 28 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. [redacted] 112

DANIEL MICHAEL MacDONALD, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WILLIAM K. JACKSON,
J. HARRY COVINGTON,
Attorneys for Petitioner.

(38,397)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 945 117

DANIEL MICHAEL MacDONALD, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Daniel Michael MacDonald, respectfully represents:

The Decisions Below.

1. On December 2, 1927, the United States Circuit Court of Appeals for the First Circuit affirmed (R.,

16) a judgment of the District Court of the United States for the District of Massachusetts (R., 5), denying petitioner's petition for naturalization, made in accordance with the Act of June 29, 1906, chapter 3592, 34 Stat., 596. Circuit Judge Anderson dissented.

2. A petition for rehearing was denied on January 12, 1928 (R., 17).

3. On April 10, 1928, Mr. Justice Holmes extended the time within which application for a writ of certiorari might be made and the record filed for a period of twenty days after April 11, 1928, to include May 1, 1928 (R., 17).

4. The opinion of the circuit court of appeals will be found in the record at page 9, and that of the district court at page 5.

Summary of the Matter Involved.

1. The question presented by this case is whether a British subject, domiciled and resident in the United States and otherwise qualified to become a citizen of the United States under the Act of June 29, 1906, is disqualified by any provision of the Act of May 9, 1918, because, during part of the five-year period preceding his petition for naturalization, he served a New Jersey corporation upon its vessels registered under the British flag, plying to and from a port of the United States and foreign countries.

2. The Act of June 29, 1906, chapter 3592, Section 4, 34 Stat., 596, 598, provided the procedure and require-

ments for naturalizing aliens in numbered subparagraphs as follows:

First. Provided for the declaration of intention to become a citizen.

Second. Provided for the petition for naturalization.

Third. Provided for an oath to support the Constitution and renounce allegiance to foreign sovereigns.

> Fourth. "It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that, immediately preceding the date of his application, he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record."

Fifth. Renunciation of orders of nobility.

Sixth. Procedure in event of death of petitioner.

3. The Act of May 9, 1918, chapter 69, 40 Stat., 542, amended Section 4 of the Act of June 29, 1906, *supra*,

by adding seven new subdivisions. These new subdivisions were to facilitate the naturalization of persons serving the United States in its armed forces or in the merchant marine, to restrict naturalization of enemy aliens and to restore citizenship to American citizens in the armed forces of nations at war with Germany. The new subdivision "Seventh" added by the Act of May 9, 1918, provided a more simplified procedure and more lenient requirements for naturalization of aliens in the armed forces of the United States, or in the merchant marine, than those provided by the Act of June 29, 1906. In the course of this subdivision occurred the following proviso (40 Stat., 544):

> "*Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry."

4. Petitioner, a British subject, was born in Big Bras d'Or, Nova Scotia, in the Dominion of Canada, on the twenty-fifth day of August, 1877. He entered the United States at the port of New York, as a passenger, September 17, 1920, on the steamship *Ebro* of the Pacific Steam Navigation Company from Callao, Peru, and paid the head tax imposed on aliens by the United States Government. He immediately established his permanent residence in the city of Boston, in the Commonwealth of Massachusetts, where he was joined by

his wife and child on September 1, 1921. Petitioner has continuously maintained a residence and resided with his wife and child in the vicinity of the city of Boston. Since his arrival in the United States, petitioner has been and still is in the service of the United Fruit Company, a corporation organized under the laws of the State of New Jersey, having its general offices in the city of Boston, as the master of one of its steamships, including at different times the steamship *Macabi*, the steamship *Maraci* and the steamship *San Benito*, all voyages commencing and ending at United States ports, principally at the port of Boston. The above-named steamships are of British registry.

5. On November 30, 1921, petitioner filed a declaration of his intention to become a citizen of the United States in the District Court of the United States for the District of Massachusetts at Boston, and thereafter duly complied with all the requirements for naturalization contained in subdivisions 1 to 4, inclusive, of the Act of Congress of June 29, 1906. Petitioner filed his petition for naturalization on December 22, 1926.

6. The district court, amongst other facts, specifically found that petitioner was in every respect eligible and qualified to become a citizen of the United States, except that during the period of his residence his employment had compelled him to sail from the port of Boston to various ports in Central America and return to the port of Boston as master of vessels registered under the laws of the Kingdom of Great Britain. The district court denied his petition for naturalization

solely on the ground that subdivision 7 of Section 4 of the Naturalization Act, as amended May 9, 1918, provided that service on vessels other than of American registry shall not be considered as residence for naturalization purposes. Petitioner contended that this proviso clause, incorporated in a new subdivision granting special rights and privileges to certain classes of aliens enumerated therein, was a limitation on those special classes only and was not a general restriction upon the rights or privileges of aliens generally, who do not come within any of the said designated privileged classes.

7. On December 2, 1927, the circuit court of appeals sustained the decision of the district court, Circuit Judge Anderson dissenting. Petitioner duly filed a petition for rehearing, which was denied on January 12, 1928. The mandate of the circuit court of appeals was stayed, pending the decision of this Court, on petitioner's application for a writ of certiorari.

Reasons Relied on for the Granting of the Writ.

1. The decision of the Circuit Court of Appeals for the First Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States v. Marco Nicolich*, decided April 4, 1928, and printed at the end of this petition (p. 9 herein).

The facts in the two cases are substantially identical. The Circuit Court of Appeals for the Fifth Circuit, referring to the decision of the Circuit Court of Appeals for the First Circuit in the present case, and certain district court cases, said:

> "We are not disposed to follow these cases and have reached a different conclusion."

A situation exists, therefore, whereby this petitioner, if a resident of New Orleans, might become a citizen of the United States, but, being a resident of Boston, is denied that right.

2. The Circuit Court of Appeals for the First Circuit has decided (in a way probably untenable) an important question of Federal law, which has not been, but should be, settled by this Court.

Few question are more important to aliens resident in the United States than the law governing their right to become citizens of the United States. It is also important to the United States that the naturalization laws applicable to alien seamen desiring to become citizens of the United States—which affects their eligibility for service on American vessels—should be settled. The petitioner contends, and the Circuit Court of Appeals for the Fifth Circuit held, that under the Act of June 29, 1906, and prior thereto, an applicant in his position was entitled to citizenship, and that the Act of May 9, 1918, did not take away his right, but merely dealt with a new and privileged class of applicants enumerated therein. The Circuit Court of Appeals for the First Circuit held to the contrary erroneously, so petitioner contends, in view of the intention of Congress and the recognized rules of statutory construction, hereafter more fully discussed.

Wherefore, the petitioner, believing that the aforesaid judgment of the United States Circuit Court of

solely on the ground that subdivision 7 of Section 4 of the Naturalization Act, as amended May 9, 1918, provided that service on vessels other than of American registry shall not be considered as residence for naturalization purposes. Petitioner contended that this proviso clause, incorporated in a new subdivision granting special rights and privileges to certain classes of aliens enumerated therein, was a limitation on those special classes only and was not a general restriction upon the rights or privileges of aliens generally, who do not come within any of the said designated privileged classes.

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Wherefore, the petitioner, believing that the aforesaid judgment of the United States Circuit Court of

Appeals for the First Circuit is erroneous, respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the First Circuit, as provided by law, to the end that the said cause may be reviewed and determined, and that upon final consideration thereof the judgment of the said United States Circuit Court of Appeals for the First Circuit may be reversed, with such directions as to this Court may seem proper and in conformity with law.

Respectfully submitted,

WILLIAM K. JACKSON,
J. HARRY COVINGTON,
Attorneys for Petitioner.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

No. 5109.

UNITED STATES OF AMERICA, *Appellant*,

v.

MARCO NICOLICH, *Appellee*.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Wayne G. Borah, U. S. Attorney; Edmond E. Talbot, Asst. U. S. Attorney, for Appellant.

Walker B. Spencer, Hugh S. Suthon (Spencer, Gidiere, Phelps & Dunbar on the brief), for Appellee.

Before WALKER, BRYAN, and FOSTER, Circuit Judges.

FOSTER, *Circuit Judge:*

It appears that appellee, a native of Austria, arrived in New Orleans August 6, 1914, and was duly admitted as an immigrant. He established a residence in that city and has continuously maintained it, residing there with his wife when at home, and his domicile in New Orleans has never been abandoned. After coming to New Orleans, he was employed as master of ships of foreign registry, owned by American citizens, and has made regular trips to foreign ports from New Orleans, always returning to his wife and home at the end of each trip. He filed his declaration of intention to become a citizen on April 18, 1923, and his petition for naturalization, under the provisions of Sec. 4 of the Act of June 29, 1906, on October 27, 1925, accompanying his petition with the certificate of arrival required

by that act. His application for citizenship came up for a hearing on March 4, 1927, and was opposed by the Bureau of Naturalization, on the ground that his residence in the United States could not be continuous for five years because of the provisions of subdivision 7, added to Sec. 4 of the Act of June 29, 1906, by the Act of May 9, 1918, which reads as follows:

> "*Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry."

The district court overruled this objection for reasons expressed in a well-considered opinion (17 Fed. (2d), 611), and admitted appellee to citizenship.

It is concened by appellant that, but for the provisions of the Act of 1918, above set out, appellee would be entitled to be naturalized, but it is contended that the said statute is an insuperable bar as long as his service on foreign vessels continues. In support of this contention, the following cases, which are undoubtedly in point, are relied upon. MacDonald *v.* U. S., 22 F. (2d), 747; *In re* Willis, 169 N. Y. S., 261; Pet. of MacKinnon, 21 F. (2d), 445. We are not disposed to follow these cases and have reached a different conclusion.

Before the Act of June 29, 1906, aliens seeking naturalization were required to file a declaration of intention at least two years prior to admission and to show five years continuous residence in the United States and one year at least within the jurisdiction of the court (R. S., 2165). An exception was made in favor

of seamen permitting them to be naturalized after serving three years on board a merchant vessel of the United States subsequent to a declaration of intention (R. S., 2174). In these respects the Act of June 29, 1906, made no change in the law.

Prior to the adoption of the Act of 1918, it was universally held by the courts that residence, within the meaning of the naturalization laws, was synonymous with domicile, and an alien once acquiring a domicile within the United States, in good faith, with the intention of becoming a citizen, did not lose it by temporary absence in pursuit of his business or vocation as a sailor, or by short visits to his native country purely for pleasure, provided he always intended to return to his domicile. Of course, a decision as to the acquisition and retention of domicile depends in each case upon the facts presented.

The Act of 1918 was adopted at the height of the World War, without the opportunity for careful consideration usually given to statutes of that character. It was intended to facilitate naturalization rather than to restrict it. The United States was in pressing need of American citizens as watch officers for the merchant fleet that was being rapidly acquired. By subdivision 7, added to the existing law by that act, sailors on American vessels were allowed to file a declaration of intention after three years' service and to be naturalized immediately, and other classes of persons were given privileges of naturalization they had not theretofore enjoyed.

A proviso should be narrowly construed and confined to the context of the act in which it appears, and it will not be given an effect repugnant to the clearly expressed intention of Congress (Dollar Savings Bank *v.* U. S., 19 Wall., 227). The proviso above set out was merely declaratory of the existing law and was evi-

dently inserted out of an abundance of caution. To give it the effect contended for, we would have to assume that it was intended to be retroactive and to deprive seamen of the benefits of the naturalization laws they have always enjoyed and which are still enjoyed by all other persons, quite contrary to the usual attitude of Congress.

We conclude that a seaman who has been duly admitted to the United States as an immigrant, and has in good faith established a domicile, is entitled to be naturalized after showing five years continuous residence and otherwise complying with the law. He does not come within the class of persons covered by the proviso and it is not a bar to his acquiring citizenship.

The judgment appealed from is

Affirmed.

(Original filed April 4, 1928.)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. ~~945~~ 117

DANIEL MICHAEL MacDONALD, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Ground on Which Jurisdiction of This Court is Invoked.

This case comes to the Court on petition for certiorari. The judgment to be reviewed was entered December 2, 1927. A petition for a rehearing was duly filed, and was denied on January 12, 1928. On April 10, 1928, Mr. Justice Holmes granted (by virtue of Section 8(*a*) of the Act of May 13, 1925) an extension of the time within which the application for the writ

might be made and the record filed to include May 1, 1928.

Statement of the Case.

The petitioner is a British subject, fifty-one years of age. He entered the United States lawfully on September 17, 1920, and established a permanent residence in the city of Boston, where he was joined by his wife and child on September 1, 1921. He has maintained this residence continuously since that time. The petitioner is, and has been since his entry into the United States, in the service of the United Fruit Company, a New Jersey corporation, in the capacity of master of one of its steamships plying between the port of Boston and Central American countries. The vessels which he has thus commanded are of British registry.

On November 30, 1921, the petitioner filed a declaration of his intention to become a citizen of the United States in the United States District Court for Massachusetts. Thereafter, on December 22, 1926, he filed his petition for naturalization in the same court.

The district court denied the petition on the ground that during a part of the five-year period preceding the filing of the petition the petitioner was serving as master of the British vessels mentioned above, plying between the port of Boston and various Central American ports, and the court was of opinion that, on account of the provisions of the proviso contained in the paragraph numbered "seventh" of Section 1 of the Act of May 9, 1918, chapter 69, 40 Stat., 542, 544, petitioner was not a resident of the United States while engaged in such service. The court found that in

every other respect the petitioner was eligible and qualified to become a citizen of the United States. The circuit court of appeals sustained the decision of the district court.

ARGUMENT.

I.

Petitioner is Unquestionably Entitled to Citizenship, Unless the Act of May 9, 1918, Changed the Provisions of Law Theretofore Applicable to Petitioners in His Position.

The only question in this case is whether the petitioner has met the legal requirements of residence necessary for a petitioner for naturalization. The Act of June 29, 1906, chap. 3592, Section 4, provides in this regard as follows:

> "Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that, immediately preceding the date of his application, he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least. * * *"

Under this statute the unbroken rule laid down by the courts was that continuous physical presence in the United States, and in the particular State or Territory, was not required, but that continuous domicile for the statutory period must have been maintained; and that the physical absence of a seaman from his domicile—

whether on a foreign or domestic vessel—did not interrupt the statutory residence required.

United States v. Rockteschell, 208 Fed., 530.
In re Schneider, 164 Fed., 335.
In re Deans, 208 Fed., 1018.
In re Timourian, 225 Fed., 570.
United States v. Jorgenson, 241 Fed., 412.
United States v. Habbick, 287 Fed., 593.
United States v. Dick, 291 Fed., 420.
United States ex rel. Devenuto v. Curran, 299 Fed., 206.
Neuberger v. United States, 13 Fed. (2d), 542.

Thus in *United States v. Rockteschell, supra* (C. C. A., 9th C.), the court considered the specific question whether a seaman who had a residence and domicile in the United States, at which he had been present only at irregular intervals and for comparatively short periods, had maintained the necessary residence for naturalization. It held that he had, saying:

> "As a condition precedent to the right of the respondent to naturalization, it was doubtless necessary for him to show continuous residence in the United States for the period of at least five years; but it is not thought that this requirement is equivalent to, or necessarily implies, continuous physical presence. • • •
>
> "It is familiar knowledge that the word 'reside' is capable of different meanings, and when employed in a statute must be construed in the light of the context and the purpose of such statute; generally, however, it signifies nothing more or less than domicile. Some light is thrown

upon the intent of Congress by the history of the statute. As originally enacted April 14, 1802 (2 Stat., 153, c. 28), the requirement was simply of five years' residence in the United States, and as then construed the term 'residence' meant 'domicile.' *In re an Alien*, Fed. Cas. No. 201*a*. By the amendment of March 3, 1813 (2 Stat., 811, c. 42), the section was made to read as follows:

"'No person who shall arrive in the United States from and after the time when this act shall take effect shall be admitted to become a citizen of the United States who shall not for the continued term of five years next preceding his admission, as aforesaid, have resided within the United States, without being at any time during the said five years out of the territory of the United States.'

"Through the change thus wrought, Congress very clearly evinced its intention of requiring continuous physical presence. But, upon the other hand, the fact that in the revision the clause, 'without being at any time during the said five years out of the territory of the United States,' was omitted, would seem to indicate a purpose again to abandon this requirement."

Likewise, the Circuit Court for the Southern District of New York in *In re Schneider*, *supra*, stated:

"A sailor who has acquired a domicile, which is the sense in which the act uses the word 'residence,' does not abandon it by going to sea. • • •"

II.

Subdivision 7 of Section 4, Added by the Act of May 9, 1918, was a War-time Measure, Applicable Only to Particular Classes of Aliens Therein Designated, and Did not Change the Law Applicable to This Petitioner.

The Act of May 9, 1918, was passed by Congress for the purpose of encouraging certain designated classes of aliens to serve in specified employments at a time during the World War, when the United States was in great need, by making the acquisition of citizenship very much easier if they entered such field of activity. In subdivision 7 (printed in full at the end of this brief) it provided that Filipinos, Porto Ricans, or aliens in the service of the army or navy, marine corps, coast guard, or merchant marine, should not have to prove five years' residence in the United States, as required by the general provisions of the Naturalization Act of June 29, 1906, before obtaining citizenship, but that, if they served for three years in any of the designated branches, they could become citizens. A proviso of subdivision 7 (which the circuit court of appeals has applied to petitioner's application for citizenship) added the following:

> " • • • *Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure

residence for naturalization purposes during service upon vessels of foreign registry."

The Circuit Court of Appeals for the Fifth Circuit in the *Nicolich* case, *supra*, stated the scope and purpose of the new subdivision and the proviso as follows:

> "The Act of 1918 was adopted at the height of the World War, without the opportunity for careful consideration usually given to statutes of that character. It was intended to facilitate naturalization rather than to restrict it. The United States was in pressing need of American citizens as watch officers for the merchant fleet that was being rapidly acquired. By subdivision 7, added to the existing law by that act, sailors on American vessels were allowed to file a declaration of intention after three years' service, and to be naturalized immediately, and other classes of persons were given privileges of naturalization they had not theretofore enjoyed.
>
> "A proviso should be narrowly construed and confined to the context of the act in which it appears, and it will not be given an effect repugnant to the clearly expressed intention of Congress (Dollar Savings Bank *v.* U. S., 19 Wall., 227). The proviso above set out was merely declaratory of the existing law and was evidently inserted out of an abundance of caution. To give it the effect contended for, we would have to assume that it was intended to be retroactive and to deprive seamen of the benefits of the naturalization laws they have always enjoyed and which are still enjoyed by all other

persons, quite contrary to the usual attitude of Congress."

The reports of committees of Congress and the explanations by committee members occurring in Congress while the Act of May 9, 1918, was under consideration, definitely show that the purpose of this act was, as stated in the opinion in the *Nicolich* case, not to place any additional limitations or restrictions upon the naturalization of aliens under the provisions of the Act of June 29, 1906, but was to enlarge the right of naturalization and to extend to the classes of aliens specifically described in the Act of May 9, 1918, the opportunity to become citizens of the United States under conditions much more favorable than those extended to aliens generally by the Act of 1906.

Mr. Hardwick, of Georgia, who had the bill in charge before the Senate, explained its scope as follows:

> "Mr. GALLINGER. * * * I simply rose to ask the Senator, because I have not had time to read the bill, precisely what the *modus* is that is prescribed in the bill. Does it, for instance, provide that this legislation is due to the fact that we are in war—that the emergency is because of that fact?"
>
> "Mr. HARDWICK. Of course, if the Senator pleases, this is war legislation; but by its terms and necessarily it can apply only to war conditions."
>
> "Mr. GALLINGER. Yes; that is what I wanted to know."
>
> "Mr. HARDWICK. *There would be no change in what would happen ordinarily in peace times;*

but this is an adjustment of our naturalization laws to the war conditions that now confront us."

"Mr. GALLINGER. That is precisely what I wanted explained."

(*Congressional Record*, April 12, 1918, p. 5009.)

Later, Mr. Hardwick, when presenting the bill to the Senate, said:

"I ask the unanimous consent that the Senate shall presently consider the bill (H. R. 3132) to amend Section 2171 of the Revised Statutes of the United States relating to naturalization. I will say, by way of explaining the request, that there are two great purposes sought to be accomplished by this bill: One is to provide for the naturalization of 123,000 soldiers of the United States whom we cannot, with either safety or justice to themselves, send abroad until this is done. The second purpose, although hardly so important and hardly so pressing, is not unimportant, and that is to readjust our naturalization laws to meet war conditions."

(*Congressional Record*, April 16, 1918, p. 5146.)

Mr. Johnson, of Washington, one of the House Committee Conferees, in discussing in the House the conference report adopting the Senate substitute, stated:

"Mr. Speaker, because this bill to amend the Naturalization Laws contains many technical phrases, it is not easy to pick out from its several paragraphs the many beneficial things that

it proposes to do for the unification and general welfare of all the people in the United States, including those aliens who hope to remain here and who are willing to help fight our battle, many of whom are in fact fighting under our flag and in the uniforms of our country, who cannot complete their naturalization without such a measure as this one."

(*Congressional Record*, May 3, 1918, p. 6012.)

Mr. Miller, of Minnesota, while discussing the new right conferred on Filipinos, said:

"You are conferring benefits and privileges by this act. *You are not taking things away.*"

(*Congressional Record*, May 3, 1918, p. 6027.)

Mr. Burnett, of Alabama, Chairman of the House committee conferees, explained to the House that the inclusion of this proviso in subdivision 7 was solely to restrict the privileges of the bill to those serving on American vessels:

"In regard to service on the merchant marine, the bill specifically says it must be the American merchant marine. It has been construed by some of the courts that those who have been serving in the foreign merchant marine may have their residence on that as residence in the United States. Hence, we put that in in order to guard it, so that only those who have served in the domestic merchant marine *are entitled to the privileges of this bill*—those who have served unde the American Flag."

(*Congressional Record*, May 3, 1918, p. 6002.)

Mr. Burnett specifically stated that this proviso clause was incorporated in subdivision 7, so that only those who have served in the domestic merchant marine are entitled to the privileges of "*this* bill." It is submitted that the Chairman's reference to "this bill" shows beyond question that the proviso clause was not a limitation on the Naturalization Laws generally, but was limited in its application to the special privileges granted by the provisions of subdivision 7.

The majority opinion of the circuit court of appeals in the present case gives to this proviso clause the scope and effect of an independent enactment. It ignores all the canons of interpretation. It ignores the spirit and purpose of the enactment.

The opinion apparently centers on the failure of Congress to place the word "such" in front of the word "alien" in the opening clause of the proviso. That the omission of the word "such" in the first clause was an accidental omission is clearly shown by the second clause of the same sentence,—"and *such* aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry."

This Court, in dealing with a similar case involving Section 4 of the Act of 1906, where there was no qualifying or limiting word preceding or following the word "alien," as a consequence of which it was contended that Congress intended to open the doors wide to all aliens, said in *Ozawa v. United States*, 260 U. S., 178, 194:

> "It is the duty of this Court to give effect to the intent of Congress. Primarily, this intent

> is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church v. United States*, 143 U. S., 457; *Heydenfeldt v. Daney Gold Mining Co.*, 93 U. S., 634, 638. * * * It is inconceivable that a rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national policy by a century of legislative and administrative acts and judicial decisions, would have been deprived of its force in such dubious and casual fashion."

It is submitted that the circuit court of appeals, in reaching its conclusion, completely ignored the spirit and reason of the amendment; it ignored the fact declared on the face of the act, and declared by the proponents of the act, that its purpose was to extend and not to restrict the privilege of acquiring citizenship; it ignored the cardinal canons of construction of a proviso and attributed to Congress an intent and purpose not only repugnant to the general policy established by legislative and administrative acts and by judicial decisions, but also an intent which was contrary to the expressed purpose of Congress in passing this particular act.

The decision of the Circuit Court of Appeals for the First Circuit establishes a class of aliens, otherwise eligible for and entitled to citizenship, who will be forever barred therefrom because of their employment. If this decision is correct, master mariners and officers and engineers of vessels cannot become citizens of the United States and are, therefore, precluded from the United States Merchant Marine because they cannot obtain licenses required by law until they acquire citizenship. (R. S. 4131, U. S. Code, title 46, Sec. 221 *et seq.*) Furthermore, foreign registered vessels owned and operated by citizens of the United States cannot be registered under the laws of the United States unless their existing officers are discharged and new officers, unfamiliar with the owner's business, are engaged. No matter how great the desire of such owners to have their vessels fly the United States flag, it is submitted they may be influenced against the transfer of registry solely because of the hardship which necessarily must be inflicted on loyal employees by such action. The result may well be that the United States Merchant Marine is seriously affected thereby.

The opinion reached by the majority of the circuit court of appeals can be sustained only if a radical change in the long-established principles governing statutory construction is made. Such an innovation, it is submitted, should be introduced, if at all, by this Court and not by the divided decision of an inferior court.

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Attorneys for Petitioner.

SUBDIVISION 7 OF SECTION 4 OF THE ACT OF JUNE 29, 1906, AS AMENDED BY THE ACT OF MAY 9, 1918.

"Seventh. Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the Regular or the Volunteer Forces, or the National Army, the National Guard or Naval Militia of any State, Territory, or the District of Columbia, or the State militia in Federal service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who has served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirements of

this subdivision it is shown that such residence cannot be established; any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; any alien declarant who has served in the United States Army or Navy, or the Philippine Constabulary, and has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon proof of continuous residence within the United States for the three years immediately preceding his petition, by two witnesses, citizens of the United States, and in these cases only residence in the Philippine Islands and the Panama Canal Zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for purposes of naturalization; and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding the limitation upon the jurisdiction of the courts specified in Section three of the Act of June twenty-ninth, nineteen hundred and six, provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court, and in each case the record of this examination shall be offered in evidence by the representative of the Gov-

ernment from the Bureau of Naturalization and made a part of the record at the original and any subsequent hearings; and, except as otherwise herein provided, the honorable discharge certificate of such alien, or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or by the masters of said vessels, shall be deemed *prima facie* evidence to satisfy all of the requirements of residence within the United States and within the State, Territory, or the District of Columbia, and good moral character required by law, when supported by the affidavits of two witnesses, citizens of the United States, identifying the applicant as the person named in the certificate of honorable discharge, and in those cases only where the alien is actually in the military or naval service of the United States, the certificate of arrival shall not be filed with the petition for naturalization in the manner prescribed; and any petition for naturalization filed under the provisions of this subdivision may be heard immediately, notwithstanding the law prohibits the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the court. Any alien who, at the time of the passage of this act, is in the military service of the United States, who may not be within the jurisdiction of any court authorized to naturalize aliens, may file his petition for naturalization without appearing in person in the office of the clerk of the court and shall not be required to take the prescribed oath of allegiance in open court. The petition shall be verified by the affidavits of at least two credible witnesses who are citizens of the United States, and who shall prove in their affidavits the portion of the residence that they have personally known the applicant to have resided within the United States. The time of military service

may be established by the affidavits of at least two other citizens of the United States, which, together with the oath of allegiance, may be taken in accordance with the terms of Section seventeen hundred and fifty of the Revised Statutes of the United States after notice from and under regulations of the Bureau of Naturalization. Such affidavits and oath of allegiance shall be admitted in evidence in any original or appellate naturalization proceeding without proof of the genuineness of the seal or signature or the official character of the officer before whom the affidavits and oath of allegiance were taken, and shall be filed by the representative of the Government from the Bureau of Naturalization at the hearing, as provided by Section eleven of the Act of June twenty-ninth, nineteen hundred and six. Members of the Naturalization Bureau and Service may be designated by the Secretary of Labor to administer oaths relating to the administration of the naturalization law; and the requirement of Section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under Section fifteen of the Act of June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes at Large, part one, page five hundred and ninety-six), may also be performed by the Commissioner or Deputy Commissioner of Naturalization: *Provided*, That it shall not be lawful to make a declaration of intention before the clerk of any court on election day or during the period of thirty days preceding the day of holding any election in the jurisdiction of the court: *Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry.

"During the time when the United States is at war no clerk of a United States court shall charge or collect a naturalization fee from an alien in the military service of the United States for filing his petition or issuing the certificate of naturalization upon admission to citizenship, and no clerk of any State court shall charge or collect any fee for this service unless the laws of the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected. A full accounting for all of these transactions shall be made to the Bureau of Naturalization in the manner provided by Section thirteen of the Act of June twenty-ninth, nineteen hundred and six."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 117.

DANIEL MICHAEL MACDONALD, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR PETITIONER.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR PETITIONER.

JURISDICTION OF THIS COURT.

This case comes to the Court on writ of certiorari to the Circuit Court of Appeals for the First Circuit. The judgment to be reviewed was entered December 2, 1927, (R. 9 to 14 inc.) and is reported in 22 Fed. (2d) 747. A petition for a rehearing was denied on January 12, 1928 (R. 14 to 16 inc.). On April 10, 1928, Mr.

Justice Holmes granted (by virtue of Section 8(a) of the Act of May 13, 1925) an extension of the time within which the application for the writ of certiorari might be made and the record filed (R. 17). The application was duly presented and the order of this Court granting the application was entered May 28, 1928.

STATEMENT OF THE CASE.

The petitioner, a British subject, was born in Big Bras d'or, Nova Scotia, Dominion of Canada, August 25, 1877. He entered the United States lawfully at New York on September 17, 1920, as a passenger on the steamship "Ebro" of the Pacific Steam Navigation Company from Callao, Peru, paid the head tax imposed upon aliens by the United States, and established a permanent residence in the City of Boston, Massachusetts, where he was joined by his wife and child on September 1, 1921. He has maintained his residence in Massachusetts continuously since his entry into the United States and has conducted himself in all respects as a permanently domiciled resident of that Commonwealth. The petitioner is, and has been since his entry into the United States, in the service of the United Fruit Company, a New Jersey corporation, in the capacity of master of one of its steamships plying between the port of Boston and Central American countries. The vessels which he has thus commanded are of British registry (R. 5, 6 and 7).

On November 30, 1921, the petitioner filed in the United States District Court for Massachusetts a declaration of his intention to become a citizen of the United States (R. 4). Thereafter, on December 22, 1926, he filed his petition for naturalization in the same court (R. 1, 2 and 3).

The District Court denied the petition on the sole ground that during a part of the five-year period preceding the filing of the petition the petitioner was serving as master of the British vessels mentioned above, plying between the port of Boston and various Central American ports. The Court was of opinion that, on account of the provisions of the proviso contained in the paragraph numbered "seventh" of Section 1 of the Act of May 9, 1918, chapter 69, 40 Stat., 542, 544,* petitioner was not a resident of the United States while engaged in such service. The Court found that in every other respect the petitioner was eligible and qualified to become a citizen of the United States (R. 5, 6 and 7). The Circuit Court of Appeals by a divided opinion sustained the decision of the District Court (R. 9 to 14 inc.).

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that the second proviso of paragraph "seventh" of Section 1 of the Act of May 9, 1918, Chapter 69, 40 Stat. 542, 544, was applicable to this petitioner. The said proviso is inapplicable to this petitioner because limited to the special classes of applicants for naturalization provided for in said paragraph enumerated "seventh" of said Act of which the said proviso was and is an integral part.

*Section 1, subparagraph "seventh," of the Act of May 9, 1918, is printed in full as Appendix B on page 35 of this brief. The proviso here in question is as follows:

> "* * * *Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry."

2. The Circuit Court of Appeals erred in holding that the said proviso of the said Act was applicable to the situation of this petitioner, even if said proviso be construed as general in scope, inasmuch as this petitioner had lawfully entered the United States and obtained a bona fide residence therein before the service upon vessels of foreign registry complained of, and nothing in said proviso contained prevented the legal maintenance for naturalization purposes of such residence so lawfully obtained.

3. The Circuit Court of Appeals erred in not reversing the District Court and directing that the certificate of naturalization issue.

ARGUMENT.

1. Petitioner is Unquestionably Entitled to Citizenship, Unless the Act of May 9, 1918, Changed the Provisions of Law Theretofore Applicable to Petitioners in His Position.

The only question in this case is whether the petitioner has met the legal requirements of residence necessary for a petitioner for naturalization. The Act of June 29, 1906, chapter 3592, Section 4, provides in this regard as follows: (The Section as amended prior to the Act of May 9, 1918, is printed in full as Appendix A, p. 31, below)

> "Fourth. It shall be made to appear to the satisfaction of the Court admitting any alien to citizenship that, immediately preceding the date of his application, he has resided continuously within the United States five years at least, and within the State or Territory where such Court is at the time held one year at least * * *."

Under this statute the unbroken rule laid down by the Courts was that continuous physical presence in the United States, and in the particular State or Territory, was not required, but that continuous *domicile* for the statutory period must have been maintained; and that the physical absence of a seamen from his domicile—whether on a foreign or domestic vessel—did not interrupt the statutory residence required.

United States v. Rockteschell, 208 Fed., 530.
In re Schneider, 164 Fed., 335.
In re Deans, 208 Fed., 1018.
In re Timourian, 225 Fed., 570.
United States v. Jorgenson, 241 Fed., 412.
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United States v. Dick, 291 Fed., 420.
United States ex rel. Devenuto v. Curran, 299 Fed., 206.
Neuberger v. United States, 13 Fed. (2d), 541.

Thus in *United States v. Rockteschell, supra* (C. C. A., 9th C.), the Court considered the specific question whether a seamen who had a residence and domicile in the United States, at which he had been present only at irregular intervals and for comparatively short periods, had maintained the necessary residence for naturalization. It held that he had, saying:

> "As a condition precedent to the right of the respondent to naturalization, it was doubtless necessary for him to show continuous residence in the United States for the period of at least five years; but it is not thought that this requirement is equivalent to, or necessarily implies, continuous physical presence * * *.
>
> "It is familiar knowledge that the word 'reside' is capable of different meanings, and when em-

ployed in a statute must be construed in the light of the context and the purpose of such statute; generally, however, it signifies nothing more or less than domicile. Some light is thrown upon the intent of Congress by the history of the statute. As originally enacted April 14, 1802 (2 Stat., 153, c. 28), the requirement was simply of five years' residence in the United States, and as then construed the term 'residence'' meant ''domicile.' *In re An Alien*, Fed. Cas. No. 201a. By the amendment of March 3, 1813, (2 Stat., 811, c. 42), the section was made to read as follows:

''No person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continued term of five years next preceding his admission, as aforesaid, have resided within the United States, without being at any time during the said five years, out of the territory of the United States.'

''Through the change thus wrought Congress very clearly evinced its intention of requiring continuous physical presence. But, upon the other hand, the fact that in the revision the clause, 'without being at any time during the said five years out of the territory of the United States,' was omitted, would seem to indicate a purpose again to abandon this requirement.''

Likewise, the Circuit Court for the Southern District of New York in *In re Schneider, supra*, stated:

''A sailor who has acquired a domicile, which is the sense in which the act uses the word 'residence,' does not abandon it by going to sea * * *''

The rule has consistently been held to be that ''domicile'', the sense in which the word ''reside'' is used in

the Naturalization Laws, can not be lost by one who leaves the country in the course of his employment with the fixed intention to return. "Residence" or "domicile" cannot be acquired by transient visit; neither can "residence" or "domicile" be lost by transient visits.

2. Subdivision 7 of Section 4, Added by the Act of May 9, 1918, Was a War-Time Measure, Applicable Only to Particular Classes of Aliens Therein Designated, and Did Not Change the Law Applicable to This Petitioner.

The Act of May 9, 1918, was passed by Congress for the purpose of encouraging certain designated classes of aliens to serve in specified employments at a time during the World War, when the United States was in great need, by making the acquisition of citizenship very much easier if they entered such field of activity. In Subdivision 7 (printed in full as Appendix B on page 35 of this brief) it provided in one long involved paragraph that Filipinos, Porto Ricans, or aliens in the service of the army or navy, marine corps, coast guard, or merchant marine, should not have to prove five years' residence in the United States, as required by the general provisions of the Naturalization Act of June 29, 1906, before obtaining citizenship, but that, if they served for three years in any of the designated branches, they could become citizens. A proviso of Subparagraph "seventh" (which the Circuit Court of Appeals has applied to Petitioner's application for citizenship) added the following:

> "* * * *Provided further*, That service by aliens upon vessels other than of American registry,

whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry."

The Circuit Court of Appeals for the Fifth Circuit in *United States v. Marco Nicolich*, 25 Fed. (2d), 245, (printed in full—Petition for Writ of Certiorari, pages 9 to 12 inc.) now pending before this Court as Number 196, October Term 1928, stated the scope and purpose of the new subdivision and the proviso as follows:

"The Act of 1918 was adopted at the height of the World War, without the opportunity for careful consideration usually given to statutes of that character. It was intended to facilitate naturalization rather than to restrict it. The United States was in pressing need of American citizens as watch officers for the merchant fleet that was being rapidly acquired. By Subdivision 7, added to the existing law by that act, sailors on American vessels were allowed to file a declaration of intention after three years' service and to be naturalized immediately, and other classes of persons were given privileges of naturalization they had not theretofore enjoyed.

"A proviso should be narrowly construed and confined to the context of the act in which it appears, and it will not be given an effect repugnant to the clearly expressed intention of Congress (*Dollar Savings Bank v. U. S.*, 19 Wall., 227). The proviso above set out was merely declaratory of the existing law and was evidently inserted out of an abundance of caution. To give it the effect contended for, we would have to assume that it was intended to be retroactive and to deprive seamen of the benefits of the naturalization laws they have

always enjoyed and which are still enjoyed by all other persons, quite contrary to the usual attitude of Congress."

A review of the Act of May 9, 1918 (*Federal Statutes Annotated*, 1918 Supplement, page 488) clearly demonstrates that the majority opinion of the Circuit Court of Appeals for the First Circuit entirely disregards the rules of statutory construction long established by this Court and also fails to consider the very evident purpose of the Act. The preamble itself states that the Act of 1906 is amended "*by adding seven new subdivisions.*" Thereupon subdivision numbered "seventh" added by the amendment proceeds to establish five privileged classes as follows:

> (1) Any *native-born Filipino* of the age of twenty-one years and upwards, who had declared his intention to become a citizen of the United States, and who had enlisted or might thereafter enlist in the United States Navy or Marine Corps, or the Naval Auxiliary Service, and who, after service of not less than three years, may have been honorably discharged therefrom, or who may have received an honorable discharge with recommendation for re-enlistment;
>
> (2) *Any alien* of the age of twenty-one years and upwards, who had enlisted or entered, or who may have thereafter enlisted in or entered the Armies of the United States, either the Regular or the Volunteer forces, or the National Army, the National Guard, or National Militia of any State, Territory, or the District of Columbia, or the State Militia in Federal Service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or *who may have served for three years* on board of *any vessel of the United States Government*, or for *three years on board of mer-*

chant or fishing vessels of the United States of more than twenty tons burden, and while still in this service on a re-enlistment or re-appointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service;

(3) *Any Porto Rican*, not a citizen of the United States, in similar circumstances;

(4) *Any alien* serving in the military or naval service of the United States *during the time this country is engaged in the existing war;*

(5) *Any alien* who has served in the United States Army or Navy, or the Philippine Constabulary, and who has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on condition that he become a citizen of the United States.

Special exemptions and privileges which were not extended by previous laws to aliens generally were accorded to these five special classes by this subdivision.

For instance, to the first, second and third classes were extended the privilege of petitioning for naturalization at any time, while still in the service mentioned or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve, after honorable service, upon presentation of the required declaration of intention, *without proof of the required five years' residence within the United States.*

To the fourth class was extended the privilege to file a petition for naturalization, *without making the preliminary declaration of intention*, and *without proof of the required five years' residence within the United States.*

To the fifth class was granted the privilege to file a petition for naturalization upon proof of continuous residence within the United States for *three* years immediately preceding the filing of the petition, and embracing within the requirement of residence within the United States, residence in the Philippine Islands and the Panama Canal Zone, as well as any place in which military service shall have been rendered by such person.

Furthermore, in respect of all said five special classes, the petition for naturalization may be filed in the most convenient court, without proof of residence within its jurisdiction and, "except as otherwise herein provided," the honorable discharge certificate of such alien or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or *by the master of the vessel* on which he had served, shall be deemed *prima facie* evidence to satisfy all the requirements of residence within the United States, and within the State, Territory or the District of Columbia.

Furthermore, contrary to the general provisions of the law, the general language of the subdivision provided that any petition for naturalization filed under the provisions of this sub-paragraph might be heard immediately, notwithstanding the law prohibited the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the Court.

The general language of the enactment also provided that any alien in the military service of the United States, who might not be within the jurisdiction of any court authorized to naturalize aliens, might file his

petition for naturalization without appearing in person. It dispensed with the requirement to take the prescribed oath of allegiance in open court.

Other provisions were made in said subdivision dispensing with other formalities which were by the general law required of aliens seeking citizenship.

It is perfectly patent that Congress had in mind and was dealing in this subdivision "seventh" with these special privileged classes of aliens, and was not dealing with, nor had in mind aliens who did not come within these special privileged classes. This brings us to a consideration of the proviso clauses, upon which the Circuit Court of Appeals based its majority opinion.

It is well known that sometimes Congress has in the past attached to some enactment a proviso which was entirely irrelevant, and had no relation to the subject matter of such enactment. For example, in the Wilson Tariff Bill fixing duties on imported articles, it attached a provision prohibiting combinations in restraint of export and import trade. In respect of such an enactment the courts have treated such a provision as an independent statute, even to the extent of treating it as a subsequent enactment modifying pre-existing statutes unrelated to the subject matter of the particular statute of which it formed a part. It is submitted, however, that the provisos under consideration here can not be considered independent enactment unrelated to the subject matter of the paragraph of which they form an integral part.

An inspection of the "seventh" subdivision of the Act of May 9, 1918, shows that these provisos are incorporated in the very body of the subdivision. They are attached at the end of the long involved first

paragraph of the subdivision which specifies the aliens entitled to the special privileges and exemptions therein mentioned, and details the procedure to be observed. This procedure is singularly informal as compared with that which other aliens must follow. The provisos are immediately followed by a second paragraph of the same subdivision dealing with the same subject matter, to wit: further exemption of such favored aliens from payment of court costs.

In other words, it is sandwiched in between provisions dealing with the same subject matter. It is evident that Congress, when it inserted these provisos in the subdivision, was dealing with these favored aliens, for before turning to the consideration of other subjects covered by the Act, it completed the provision relating to them by enacting exemptions in their favor from court costs. This in itself is a significant fact.

Even a casual reading of that subdivision shows that Congress, in a most generous manner, was throwing down the bars to citizenship. It was offering American citizenship to men theretofore barred; it was giving aliens, who might never have had residence in continental United States one single day, and who had spent their years in service on foreign vessels, upon enlistment in the services mentioned, citizenship under relaxed requirements; it was making three years service on even a fishing boat of American registry of twenty tons burden in any part of the world equivalent to five years' continuous residence in continental United States; it was not even requiring that service on a ship of American registry should have been continuous for three years preceding the petition for naturalization; it was permitting any alien who

at any time, however remote, and at any place, however remote from continental United States, had served in the United States Army or Navy or in the Philippine Constabulary in any capacity, upon enlistment in the Army or Navy, and upon proof of three years' continuous residence in continental United States, the Philippine Islands or the Canal Zone, to become an American citizen without formality of previous declaration of intention, and without compliance with many of the other provisions relating to other aliens.

Evidently it was thought by Congress that the unqualified provisions of the "seventh" subdivision were too lax as applied to alien seamen. These provisions, if the provisos had not been added, would have permitted:

> (a) Discontinuous or intermittent service on American ships for three years to establish residence within the United States for naturalization purposes if some part of the service on American vessels was rendered within six months of the filing of the petition;
>
> (b) The declaration of intention to be filed within thirty days of an election;
>
> (c) The certificate of the master of such ship to be *prima facie* proof of such service and of necessary residence.

Such provisions would have been peculiarly open to abuse. But by the provisos this broad statute is restricted by providing:

> That declaration of intention can not be filed within thirty days of an election; that service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be

considered as residence for naturalization purposes within the jurisdiction of the United States, and that such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry; or, *per contra;* that residence within the United States for naturalization purposes can be established by such privileged aliens only by three years' *continuous* service on American ships, and discharge from such service had within six months prior to the filing of the petition.

These circumstances show the direct and necessary relations of the provisos to the immediately preceding general enacting clauses of the "seventh" subdivision. This relation is further shown by the language used. It should be noted that the second clause of the sentence states "such aliens can not *secure* residence for naturalization purposes during service upon vessels of foreign registry." What does the word "secure" mean? It is obviously used in its ordinary meaning, "obtain." And the purpose of the proviso is clearly to compel an alien to spend three continuous years in service on American ships in order to obtain (secure) the equivalent of a five-year lawfully established and maintained residence or domicile in the United States. As pointed out above, citizenship under the special provisions of the "seventh" subdivision can be obtained by an alien who has never established a domicile in the United States. In order to interpret the proviso as an independent enactment and make it applicable to an alien such as Petitioner who has lawfully entered the United States as an immigrant and established a residence, it is submitted that the word "maintain" must be substituted for

the word "secure." Service on an American ship is not necessary to enable such an alien as petitioner to "secure" residence within the United States. He has secured it by the lawful establishment of an actual domicile in Massachusetts. He needs only to "maintain" that domicile for five years to be entitled to naturalization. However, service on an American vessel would "secure" a constructive residence under the provisions of the "seventh" subdivision for an alien who has never established an actual domicile in the United States. Congress would have used the word "maintain" and not the word "secure," had it intended this proviso to be an independent enactment. To construe the provisos as applicable to this petitioner is to attribute to Congress a flagrant misuse of simple words. This, of course, cannot be done.

Furthermore, to give the proviso the broad scope accorded it by the Circuit Court of Appeals makes it repugnant to, and inconsistent with the very public policy which induced the enactment of the amending statute itself, namely: to induce acquisition of citizenship by persons who would be useful in the military, naval or merchant marine service of the United States. Keeping in mind the object and purpose of this amendatory Act, it would seem absurd that Congress, anxious as it was to make citizens of aliens who could be of service to the United States in the military, naval or merchant marine service, should at the same time deliberately cut off from citizenship persons even more desirable, and even more deserving of citizenship than the classes they were dealing with in this Act. For if the Circuit Court of Appeals' construction is correct, an alien master mariner who had lived continuously in continental United States for twenty years, who had

declared his intention of becoming a citizen and was in all other respects qualified, would be denied the privilege of citizenship, if at any time, no matter for how short a time, within the last preceding five years, he had served on a foreign vessel. Yet Congress deliberately extended citizenship to an alien who had never been in continental United States, or even in any of its territories or possessions, under less rigorous requirements, if he happened to have served the last preceding three years on a fishing vessel of the United States over twenty tons burden. It is submitted that to sustain such a construction would make he Act of Congress illogical, unreasonable and almost absurd, and it should not be sustained unless it is clear and unavoidable that the proviso was an independent enactment, and was intended to relate to matters other than that being dealt with.

The only way in which the Circuit Court of Appeals' majority decision can be sustained is (to quote the language of Chief Justice White in *Pennington v. United States*, 231 U. S. 631, 637), "by wrenching the provision asunder," and treating these provisos as independent enactments, and not as provisos designed to limit or qualify the immediately preceding enactments of subdivision "seventh." This the Court said should not be done, unless it was plainly manifest and clear and unavoidable that Congress so intended it to be.

In the *Pennington case, supra*, the contention was made that a rider on an Appropriate Bill was an independent enactment. The Court, in disposing of this contention, in part said (pages 637, 638):

> "In other words, the only avenue of approach for the proposition is through a gateway created

by wrenching the provision asunder. We are of opinion that this may not be done. (*White v. United States*, 191 U. S. 545; *Georgia Banking Company v. Smith*, 128 U. S. 174, 181). But it is insisted that the words following the word 'provided' do not technically amount to a proviso and therefore the clause must be divided into two independent parts consisting the one of that portion which goes before the word 'provided' and the other that portion which follows it. And when this is done the argument is that the word 'all' in the latter portion renders it necessary to give to that portion the far-reaching significance claimed. Conceding for argument's sake that the latter part of the provision, that is, the portion which follows the word 'provided,' may not be technically a proviso, nevertheless the fact that the two provisions are united in enactment in one and the same clause giving no intrinsic manifestation of a legislative purpose to separate them, causes the concession to be without influence in determining the proper construction of the provision. • • • And this leads us finally to examine the contention that as in modern practice it has become common to adopt independent legislation on appropriation bills by what is called a 'rider,' therefore the provision here involved should be treated as having that character and be accordingly independently interpreted as claimed. But whatever be the new habit, it can in no respect serve to relieve the judiciary, when called upon to consider a statute, of the old duty of correctly interpreting it. Indeed, the very suggestion of the practice of 'riders' admonishes that things may not be so associated as one for the purpose of securing the enactment of legislation upon the theory that they are one and when enacted be disassociated for the purpose of judicial construction so as to cause them to be wholly independent, one of the other."

To give the proviso the effect and meaning claimed by the Circuit Court of Appeals would be to reverse the century-old policy of the Government as expressed in its naturalization laws and in the decisions of its Courts. If Congress had intended to reverse this policy, it would seem that it would have done so by separate enactment or in unmistakable language, and not by an obscure, ambiguous proviso. Such intent, however, was manifestly not entertained by Congress in 1918.

This Court has strictly adhered to the rule that where the statute itself does not clearly show its scope, resort may be had to the reports of the committees and the explanatory statements made by the committee members in charge of the bill in the course of its passage by the legislative bodies for the purpose of ascertaining the legislative intent. However, discussions before the committees and debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. The reason for this latter rule, as stated in *United States v. Freight Associations*, 166 U. S. 290, 318, is that "it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof." The explanatory statements of the committee members made directly to the legislative bodies only can be indicative of the intent with which the statute was passed.

Maxwell v. Dow, 176 U. S. 581, 601.
Binns v. United States, 194 U. S. 486, 495.
Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, 198-199.

United States v. Coca Cola Co., 241 U. S. 265, 281.
United States v. St. Paul, Minn. & Man. Ry. Co., 247 U. S. 310, 318.
Duplex Printing Press Co. v. Deering, 254 U. S. 443, 474-475.
Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563, 589.

The reports of committees and the explanations by committee members occurring in Congress while the Act of May 9, 1918, was under consideration, definitely show that the purpose of this Act was, as stated above and in the opinion in the *Nicolich* case, not to place any additional limitations or restrictions upon the naturalization of aliens under the provisions of the Act of June 29, 1906, but was to enlarge the right of naturalization and to extend to the classes of aliens specifically described in the Act of May 9, 1918, the opportunity to become citizens of the United States under conditions much more favorable than those extended to aliens generally by the Act of 1906.

Mr. Hardwick, of Georgia, who had the bill in charge before the Senate, explained its scope as follows:

> "Mr. Gallinger * * * I simply rose to ask the Senator, because I have not had time to read the bill, precisely what the modus is that is prescribed in the bill. Does it, for instance, provide that this legislation is due to the fact that we are in war—that the emergency is because of that fact?"
>
> "Mr. Hardwick. Of course, if the Senator pleases, this is war legislation; but by its terms and necessarily it can apply only to war conditions."
>
> "Mr. Gallinger. Yes; that is what I wanted to know."

"Mr. Hardwick. *There would be no change in what would happen ordinarily in peace times; but this is an adjustment of our naturalization laws to the war conditions that now confront us.*"

"Mr. Gallinger. That is precisely what I wanted explained."

(*Congressional Record*, April 12, 1918, p. 5009)

Later, Mr. Hardwick, when presenting the bill to the Senate, said:

"I ask the unanimous consent that the Senate shall presently consider the bill (H. R. 3132) to amend Section 2171 of the Revised Statutes of the United States relating to naturalization. I will say, by way of explaining the request, that there are two great purposes sought to be accomplished by this bill: One is to provide for the naturalization of 123,000 soldiers of the United States whom we can not, with either safety or justice to themselves, send abroad until this is done. The second purpose, although hardly so important and hardly so pressing, is not unimportant, and that is to readjust our naturalization laws to meet war conditions."

(*Congressional Record*, April 16, 1918, p. 5146)

Mr. Johnson, of Washington, one of the House Committee Conferees, in discussing in the House the conference report adopting the Senate substitute, stated:

"Mr. Speaker, because this bill to amend the naturalization laws contains many technical phrases, it is not easy to pick out from its several paragraphs the many beneficial things that it proposes to do for the unification and general welfare of all the people in the United States, including those aliens who hope to remain here and who are willing to help fight our battle, many of whom are

> in fact fighting under our flag and in the uniforms of our country, who can not complete their naturalization without such a measure as this one."
> (*Congressional Record*, May 3, 1918, p. 6012)

Mr. Miller, of Minnesota, while discussing the new right conferred on Filipinos, said:

> "You are conferring benefits and privileges by this Act. *You are not taking things away.*"
> (*Congressional Record*, May 3, 1918, p. 6027)

Mr. Burnett, of Alabama, Chairman of the House Committee Conferees, explained to the House that the inclusion of the proviso herein involved in subdivision "seventh" was solely to restrict the privileges of the bill to those aliens serving on American registered vessels:

> "In regard to service on the merchant marine, the bill specifically says it must be the American merchant marine. It has been construed by some of the courts that those who have been serving in the foreign merchant marine may have their residence on that as residence in the United States. Hence, we put that in in order to guard it, so that only those who have served in the domestic merchant marine *are entitled to the privileges of this bill*—those who have served under the American Flag."
> (*Congressional Record*, May 3, 1918, p. 6002)

Mr. Burnett specifically stated that this proviso clause was incorporated in subdivision "seventh," so that only those who have served in the domestic merchant marine are entitled to the privileges of "*this bill.*" It is submitted that the Chairman's reference to

"*this bill*" shows beyond question that the proviso clause was not a limitation on the Naturalization Laws generally, but was limited in its application to the special privileges by the provisions of subdivision "seventh."

The majority opinion of the Circuit Court of Appeals in the present case gives to this proviso clause the scope and effect of an independent enactment. It ignores all the canons of interpretation. It ignores the spirit and purpose of the enactment.

The opinion apparently centers on the failure of Congress to place the word "such" in front of the word "alien" in the opening clause of the proviso. That the omission of the word "such" in the first clause was an accidental omission is clearly shown by the second clause of the same sentence,—"and *such* aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry." If necessary to make the intent of Congress a rational one, it is submitted the Court should interpolate the word "such" in the first clause of the sentence of the proviso, and make it logical and consistent with the general policy and object of the law.

This Court, in dealing with a similar case involving Section 4 of the Act of 1906, where there was no qualifying or limiting word preceding or following the word "alien," as a consequence of which it was contended that Congress intended to open the doors wide to all aliens, said in *Ozawa v. United States*, 260 U. S., 178, 194:

> "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result

> plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church v. United States*, 143 U. S., 457; *Heydenfeldt v. Dancy Gold Mining Co.*, 93 U. S., 634, 638 * * * It is inconceivable that a rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions, would have been deprived of its force in such dubious and casual fashion."

The majority opinion in the present case not only disregarded the principle set forth in *Ozawa v. United States, supra*, but also cited as authority for its decision the opinion of a District Court without knowing the facts upon which that opinion was based. The opinion referred to is that of the District Court for the Eastern District of New York in *Petition of MacKinnon*, 21 Fed. (2d) 445, which affirms its previous decision in *United States v. Habbick*, 287 Fed., 593. It is submitted that the majority opinion was based on a misapprehension of the substance of Mr. Justice Campbell's remarks in that case. In denying MacKinnon's petition, the District Court did not hold that the proviso clause of subdivision "seventh" of Section 4 was applicable to petitions for citizenship under the general provisions of the Naturalization Laws and deny the petition because of that fact, as is stated in the majority opinion (R. 12). This proviso clause was only incidentally mentioned. The basis of the decision was stated by Mr. Justice Campbell to be the same as

in his opinion in *United States v. Habbick*, 287 Fed., 593, and as in Mr. Justice Callaghan's opinion in *In re Willis*, 169 N. Y. Supp. 261. The opinion in *United States v. Habbick* states that Habbick returned to his native country and there shipped on foreign registered vessels. His act of obtaining employment in his native country showed an intention to relinquish his residence (domicile) in the United States. Mr. Justice Campbell stated that, had he shipped on vessels from United States ports while a resident of the United States, and returned to United States ports, he would have been entitled to citizenship. In *In re Willis* the opinion states that Willis was married prior to coming to the United States in 1910, but did not bring his wife to the United States for over five years. The Court, therefore, held that his being ashore in the United States was a matter of convenience and without any bona fide intention of becoming a resident. Willis had, therefore, never established a bona fide domicile in the United States.

Mr. Justice Campbell's opinion in the *MacKinnon* case must be examined and construed in the light of the facts to which it is applicable. There is no statement in the *MacKinnon* opinion which indicates that the facts are materially different from the facts in the *Habbick* case. There is nothing to show that MacKinnon actually established a bona fide residence (domicile) in the United States and thereafter shipped from United States ports and returned to United States ports. On the contrary, the opinion states that MacKinnon arrived in the United States on January 6, 1912, and that he was master of the British steamship "Mayaro" from January 6, 1912, to September 14, 1915, thereby indicating that he arrived in the United

States in the service of that vessel. The fact is that MacKinnon shipped on the steamship "Mayaro" in a foreign country and arrived in the United States, January 6, 1912, as first officer of that steamship. The naturalization records show that he has never paid a head tax. It is submitted that MacKinnon's petition was denied because he had never entered the United States as an immigrant and could not, therefore, obtain a domicile in the United States. Only on this basis can Mr. Justice Campbell reconcile his decision in the *MacKinnon* case with his statement in the *Habbick* opinion that Habbick would have been entitled to admission to citizenship if he had shipped from and returned to United States ports instead of shipping from foreign ports.

It is submitted that the Circuit Court of Appeals, in reaching its conclusion, completely ignored the spirit and reason of the amendment; it ignored the fact declared on the face of the Act, and declared by the proponents of the Act, that its purpose was to extend and not to restrict the privilege of acquiring citizenship; it ignored the cardinal canons of construction of a proviso and attributed to Congress an intent and purpose not only repugnant to the general policy established by legislative and administrative acts and by judicial decisions, but also an intent which was contrary to the expressed purpose of Congress in passing this particular Act.

3. The Proviso Even If Given General Scope is Not Applicable to the Facts of This Case.

We have shown above that the proviso in question is by the plain terms of the statute restricted to, and places a limitation upon the privileges extended to, the

special classes of aliens created by subdivision "seventh" of which it is a part. We have also shown the reasons for the limitation of those privileges.

Petitioner was not a member of any of those special classes and does not claim the special privileges.

But, moreover, the proviso even if given general and unrestricted scope does not apply to this petitioner.

The proviso contains two provisions. It says, first:

> "That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States * * *."

Petitioner does not claim constructive residence within the United States but actual residence. He claims a residence not on a ship but in Massachusetts where his family is and has been established for more than five years. If he were claiming as residence something which was not actual residence,—that is, service at sea,—then that service must be on an American ship, and any other service would not be regarded as the equivalent of residence within the United States. But he does not. He does not claim that anything be regarded as residence within the United States which is not actual bona fide legal residence in a particular house in a particular town in Massachusetts. Therefore, the first clause of the proviso can have no application to him on any view of its scope.

Second, the proviso says:

> "and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry."

This clause is also inapplicable. Petitioner did not secure his residence for naturalization or any other purpose during service upon vessels of foreign registry. He came to the United States as a passenger and entered as an immigrant paying the head tax. This was on September 17, 1920. The District Court found further that since that date "he has maintained his residence continuously in the United States and in the Commonwealth of Massachusetts." (R. 5) And in the order of the District Court (R. 7) it is further recited:

> "As the said Daniel Michael MacDonald, *subsequent to establishing his residence in the Commonwealth of Massachusetts*, has served on vessels other than vessels of American registry * * *."

Therefore, it is clear that the second clause of the proviso by the very findings recited by the District Court can not apply to this petitioner under any view of their scope. The petitioner did not secure his residence "*during*" his service on a foreign ship. That service, in the words of the lower court, was "*subsequent to establishing his residence.*" That clause does not say and can not mean that residence lawfully and bona fide acquired is thereafter lost by such service. It says that it can not be obtained during the service and it was not so obtained by this petitioner.

If the proviso is sought to be given any application to aliens outside the special and privileged classes created by subdivision "seventh," its plain words will permit no wider meaning than that an alien seaman serving on a foreign ship can not come ashore in the United States under a seaman's temporary permit and while so present in this country attempt to "secure" a shore residence. But the language of the proviso—

quite aside from the obvious intent of Congress—will not permit a construction of the proviso as discrimination against seamen as a class. Any alien who lawfully enters this country, establishes and maintains a bona fide domicile here for five years and meets the other requirements of the law, may become naturalized even though his business takes him abroad for long periods whether on foreign or domestic vessels. See cases on page 5, *supra*.

The law is no different as to seamen. On the widest construction of the proviso it places only two limitations upon them:

(1) If they seek to establish a constructive residence by reason of their sea service, then only service on an American vessel can be so regarded; and

(2) During this service on a foreign ship they can not *secure* the residence on land which must be thereafter *maintained* for five years to qualify them under the general provisions of the law.

But seamen who enter lawfully as other aliens may lawfully obtain an actual domicile as other aliens may, and are under no disability in following their profession as others aliens may. And nothing in the law provides that their domicile once lawfully obtained is lost in any way except by abandonment.

The decision of the Circuit Court of Appeals for the First Circuit establishes a class of aliens, otherwise eligible for and entitled to citizenship, who will be forever barred therefrom because of their employment. If this decision is correct, master mariners and officers and engineers of American-owned vessels of foreign

registry operating continuously out of United States ports can not become citizens of the United States and are, therefore, precluded from the United States Merchant Marine because they can not obtain licenses required by law until they acquire citizenship (R. S. 4131, U. S. Code, title 46, Sec. 221 *et seq.*). Furthermore, foreign registered vessels owned and operated by citizens of the United States can not be registered under the laws of the United Stats unless their existing officers are discharged and new officers, unfamiliar with the owner's business, are engaged. No matter how great the desire of such owners to have their vessels fly the United States flag, it is submitted they may be influenced against the transfer of registry solely because of the hardship which necessarily must be inflicted on loyal employees by such action. The result may well be that the United States Merchant Marine is seriously affected thereby.

The opinion reached by the majority of the Circuit Court of Appeals can be sustained only if a radical change in the long-established principles governing statutory construction is made. Such an innovation, it is submitted, should not be introduced.

Respectfully submitted,

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APPENDIX A.

Section 4 of the Act of June 29, 1906, Chapter 3592, 34 Stat. 596-598, as amended by the Act of Congress approved March 4, 1913 (37 Stat. 736) creating the Department of Labor, provides as follows:

Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: *Provided, however*, That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a

port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: *Provided*, That if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting.

The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he at the time of filing of his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application.

The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the State, Territory, or the District of Columbia,* in which the application is

*The word "District" amended by the act of May 9, 1918, to read "the District of Columbia."

made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States.

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

Fifth. In case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

Sixth. When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention.

APPENDIX B.

The Act of May 9, 1918, Chap. 69, Section 1, 40 Stat. 542-544, provides in part as follows:

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That section four of the Act, entitled, "An Act to establish a Bureau of Immigration and Naturalization and to provide a uniform rule for the naturalization of aliens throughout the United States," approved June twenty-nine, nineteen hundred and six, be, and is hereby, amended by adding seven new subdivisions as follows:

Seventh. Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the Regular or the Volunteer Forces, or the National Army, the National Guard or Naval Militia of any State, Territory, or the District of Columbia, or the State militia in Federal service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who has served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, may, on presentation of the required declaration of intention pe-

tition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirements of this subdivision it is shown that such residence can not be established; any alien serving in military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; any alien declarant who has served in the United States Army or Navy, or the Philippine Constabulary, and has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon proof of continuous residence within the United States for the three years immediately preceding his petition, by two witnesses, citizens of the United States, and in these cases only residence in the Philippine Islands and the Panama Canal Zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for purposes of naturalization; and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding the limitation upon the jurisdiction of the courts specified in section three of the act of June twenty-ninth, nineteen hundred and six, provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court, and in each case the record of this examination shall be offered in evidence by the representative of the Government from the Bu-

reau of Naturalization and made a part of the record at the original and any subsequent hearings; and, except as otherwise herein provided, the honorable discharge certificate of such alien, or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or by the masters of said vessels, shall be deemed prima facie evidence to satisfy all of the requirements of residence within the United States and within the State, Territory, or the District of Columbia, and good moral character required by law, when supported by the affidavits of two witnesses, citizens of the United States, identifying the applicant as the person named in the certificate or honorable discharge, and in those cases only where the alien is actually in the military or naval service of the United States, the certificate of arrival shall not be filed with the petition for naturalization in the manner prescribed; and any petition for naturalization filed under the provisions of this subdivision may be heard immediately, notwithstanding the law prohibits the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the court. Any alien, who, at the time of the passage of this act, is in the military service of the United States, who may not be within the jurisdiction of any court authorized to naturalize aliens, may file his petition for naturalization without appearing in person in the office of the clerk of the court and shall not be required to take the prescribed oath of allegiance in open court. The petition shall be verified by the affidavits of at least two credible witnesses who are citizens of the United States, and who shall prove in their affidavits the portion of the residence that they have personally known the applicant to have resided within the United States. The time of military service may be established by the affidavits of at least two other citizens of the United States, which, together with the oath of allegiance, may be taken in accordance with the terms of section seventeen hundred and fifty of the Revised Statutes of the

United States after notice from and under regulations of the Bureau of Naturalization. Such affidavits and oath of allegiance shall be admitted in evidence in any original or appellate naturalization proceeding without proof of the genuineness of the seal or signature or of the official character of the officer before whom the affidavits and oath of allegiance were taken, and shall be filed by the representative of the Government from the Bureau of Naturalization at the hearing as provided by section eleven of the act of June twenty-ninth, nineteen hundred and six. Members of the Naturalization Bureau and Service may be designated by the Secretary of Labor to administer oaths relating to the administration of the naturalization law; and the requirement of section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under section fifteen of the act of June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes at Large, part one, page five hundred and ninety-six), may also be performed by the Commissioner or Deputy Commissioner of Naturalization: *Provided*, That it shall not be lawful to make a declaration of intention before the clerk of any court on election day or during the period of thirty days preceding the day of holding any election in the jurisdiction of the court: *Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as resi dence for naturalization purposes within the jurisdiction of the United States, and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry.

During the time when the United States is at war no clerk of a United States court shall charge or collect a naturalization fee from an alien in the military service of the United States for filing his petition or issuing the certificate of naturalization upon admission to citizenship, and no clerk of any State court shall charge or collect any fee for this service unless the laws of the State require such charge to be made, in which case

nothing more than the portion of the fee required to be paid to the State shall be charged or collected. A full accounting for all of these transactions shall be made to the Bureau of Naturalization in the manner provided by section thirteen of the act of June twenty-ninth, nineteen hundred and six.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 945

DANIEL MICHAEL McDONALD, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 9) is reported in 22 F. (2d) 747. The opinion of the District Court appears at page 5 of the record.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered on December 2, 1927. (R. 16.) A petition for rehearing was filed and entertained, but denied on January 12, 1928. (R. 17.) By order of this

Court dated April 10, 1928, the time within which application for certiorari might be filed was extended to and including May 1, 1928. (R. 17.) Petition for certiorari was filed in this Court on April 28, 1928.

The jurisdiction of this Court to issue the writ prayed for is conferred by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner, who was denied naturalization, contends, in substance, that service on board a vessel of foreign registry owned by a New Jersey Corporation may be treated as a part of the five-year period of residence required by the Naturalization Act.

STATEMENT

Petitioner was denied naturalization by the United States District Court for the District of Massachusetts on the ground that his period of service as master of vessels of foreign registry, although American owned, could not be counted as part of the five-year period of residence required by the Naturalization Act. The vessels upon which he served were owned by the United Fruit Company, a New Jersey corporation, but they were of British registry. The vessels upon which petitioner served made trips between this country and Central America. Petitioner maintained a home

at Boston, Massachusetts, for his wife and child, and of course he lived there between trips. (R. 6.)

The Circuit Court or Appeals also ruled against him, although one judge dissented. (R. 9 and 12.)

STATUTE INVOLVED

As it is the contention of petitioner that the proviso in the statute here involved must be restricted to certain classes of aliens granted special privileges by the Act, we quote here the statutory provisions immediately preceding the proviso so the Court may be able to see the setting of the proviso. The statutory provisions are contained in Section 1 of the Act of May 9, 1918, c. 69, 40 Stat. 542, 544 (U. S. C. Title 8, Secs. 354, 374, 383, 388 and 405), and so far as immediately pertinent, read as follows:

> * * * Members of the Naturalization Bureau and Service may be designated by the Secretary of Labor to administer oaths relating to the administration of the naturalization law; and the requirement of section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under section fifteen of the Act of June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes at Large, part one, page five hundred and ninety-six), may also be performed by the Commissioner or Deputy Commissioner of Naturalization: *Provided,* That it shall not be lawful to make a declaration of intention before the clerk of any court on election day

or during the period of thirty days preceding the day of holding any election in the jurisdiction of the court: *Provided further,* That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry.

ARGUMENT

GOVERNMENT DOES NOT OPPOSE GRANTING OF THE WRIT IN THIS CASE

While the opinion of the Circuit Court of Appeals below appears to correctly interpret the proviso here drawn in question, it is true that the Circuit Court of Appeals for the Fifth Circuit has, as pointed out by petitioner, ruled to the contrary in *United States* v. *Nicolich*, decided April 4, 1928, but not yet reported. Petitioner has printed the opinion in that case at page 9 of his petition for certiorari. The service in that case, as in the case at bar, was aboard vessels of foreign registry, but American owned. Indeed the Circuit Court of Appeals in the *Nicolich case, supra*, specifically refused to follow the ruling of the Circuit Court of Appeals in the case at bar.

The United States will shortly file a petition for certiorari in the *Nicolich case*.

CONCLUSION

Because of the conflict of decisions, the United States does not oppose the granting of the writ prayed for by petitioner.

WILLIAM D. MITCHELL,
Solicitor General.
O. R. LUHRING,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

MAY, 1928.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 117

DANIEL MICHAEL McDONALD, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 9) is reported in 22 F. (2d) 747. The findings of fact and order of the trial court may be found at pages 5–7 of the record.

JURISDICTION

The judgment to be reviewed was entered on December 2, 1927. (R. 16.) Petition for rehearing was denied on January 12, 1928. (R. 17.) On April 10, 1928, a Justice of this Court extended until May 1, 1928, the time within which petition

for writ of certiorari might be filed. (R. 17.) The petition was filed on April 28, 1928, and granted on May 28, 1928. (R. 18.)

QUESTION PRESENTED

An alien applying for naturalization had maintained a domicile and place of abode in the United States for five years immediately prior to his application, but during that period served on merchant vessels of foreign registry. The question is whether the proviso in the Act of 1918 to the effect that aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry prevents his being credited with residence during such service.

STATUTES INVOLVED

Paragraph Fourth of Section 4 of the Act of June 29, 1906 (c. 3592, 34 Stat. 596, 598; U. S. C. Title 8, sec. 382), provides that to entitle an alien to citizenship—

> It shall be made to appear * * * that immediately preceding the date of his application he has resided continuously within the United States five years at least. * * *

The Act of June 29, 1906, was amended by the Act of May 9, 1918 (c. 69, 40 Stat. 542, 544; U. S. C. Title 8, sec. 384), by the addition of new subdivisions containing the following proviso:

> *Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not

> be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry.

Other pertinent parts of the Act of May 9, 1918, are in the appendix to this brief.

STATEMENT

The petitioner, a British subject, filed a petition for naturalization December 22, 1926. (R. 6.) He entered the United States September 17, 1920, at the port of New York, as a passenger on a steamship arriving from Peru. (R. 6.) The findings state that he has resided continuously in Massachusetts since September 17, 1920. (R. 5.) Since his arrival at the Port of New York he has been continuously in the service of the United Fruit Company, a New Jersey corporation, as the master of one of its steamships. (R. 6.) His wife joined him September 1, 1921, and he has since maintained a place of abode for himself, his wife, and child in Boston. (R. 6.) The statements in the findings no doubt mean that he has had a place of abode and domicile within the United States, but during a great part of the time since his arrival in 1920 has been outside the United States on voyages in vessels of foreign registry, being at his place of abode only between voyages.

He possesses all other requisites for naturalization, the only question being as to his residence.

The District Court denied naturalization on the ground that the proviso in the Act of May 9, 1918, above quoted, prevented his being considered a resident for naturalization purposes while serving on foreign vessels, notwithstanding his maintenance of a place of abode and domicile in the United States.

The Circuit Court of Appeals affirmed this decision, one judge dissenting.

SUMMARY OF ARGUMENT

I. The proviso in the Act of May 9, 1918, is general legislation and relates not merely to the context of the amendment, but to the whole Naturalization Act.

The words of the proviso show the intention of Congress to deny applicants for naturalization credit for domicile or residence in the United States during periods they serve on vessels of foreign registry. Congress had previously given advantages in naturalization to alien seamen serving on American vessels, allowing them to be naturalized after three years of such maritime service. The Act now being considered was intended to further encourage service on American merchant ships by discouraging alien seamen domiciled in the United States from serving on foreign ships. There is nothing unreasonable about this. An alien, though technically domiciled here, who spends most of his time outside the United States serving on foreign ships, is not in a position to

learn much of our institutions or to acquire an attachment to the principles of the Constitution.

A reading of the entire subdivision shows that the proviso is not limited to the classes of aliens dealt with in the subdivision, as there is no relation between service on foreign ships and the other classes of aliens dealt with in the new subdivision.

The words "service by aliens upon vessels other than of American registry" relate to all aliens in that service, and the words "such aliens" in the last clause of the proviso refer to the aliens serving on foreign vessels, mentioned in the preceding clause.

II. The reasoning of the courts below is more persuasive than that in *United States* v. *Nicolich*, 25 F. (2d) 245, in which the contrary conclusion was reached. The argument there that the proviso was intended only to prevent service on foreign ships from constituting in itself residence in the United States, is not reasonable. Saying that aliens serving three years on vessels of American registry might be naturalized did not make it necessary, out of abundance of caution, to add a proviso that service on vessels of foreign registry should not be considered service on American ships.

The proviso obviously deals with aliens serving on foreign ships who, by having domicile here, could claim residence.

The phrase "residence for naturalization purposes" implies the existence of residence for other purposes.

III. Nothing in the Congressional Record or Reports of Committees supports the contention of the petitioner or discloses an intention not derived from the words of the statute.

ARGUMENT

I

THE PURPOSE OF CONGRESS WAS TO PROVIDE THAT NO ALIEN WHILE SERVING ON FOREIGN SHIPS SHOULD BE CREDITED WITH RESIDENCE FOR NATURALIZATION PURPOSES, ALTHOUGH HAVING A RESIDENCE OR DOMICILE HERE FOR OTHER PURPOSES

The petitioner contends, and the United States Circuit Court of Appeals for the Fifth Circuit in *United States* v. *Nicolich*, 25 F. (2d) 245, held, that the proviso means only that service on vessels of foreign registry does not in itself constitute residence in the United States and that the proviso was not intended to deprive an alien seaman having a place of abode and domicile here, to which he returns between voyages, of residence for naturalization purposes, merely because of service on foreign vessels.

It would have been a waste of words to do what petitioner contends was done by this statute.

An alien serving on vessels of foreign registry and not maintaining any place of abode or domicile in the United States could not plausibly claim residence here. Congress would not have wasted its

time to make a statutory declaration of so self-evident a proposition.

The provision that service for three years on vessels of American registry entitled an alien to naturalization did not make it necessary for Congress to say "out of abundant caution" that service on foreign vessels should not have the same effect. It was not necessary for Congress to provide that where it said service on vessels of American registry it did not mean vessels of foreign registry. The proviso must have been enacted to apply to aliens who had some other pretensions to residence here than mere service on foreign vessels and to cover cases of this kind, and prevent an alien being credited with residence for naturalization purposes during service on foreign vessels, although maintaining a domicile here.

The phrase "residence for naturalization purposes" necessarily implies the existence of a residence for other purposes.

The petitioner contends that the proviso here in question is applicable only to the particular classes of aliens designated in the immediately preceding context of the Act of May 9, 1918. To make this clearer, he asks this Court to "interpolate the word '*such*' " before the word "aliens" in the first clause of the proviso. (Brief, p. 23.)

What classes of aliens are mentioned in the context of the Act of May 9, 1918, immediately preceding the proviso? They are, "any alien * * *

(1) who has enlisted or entered or may hereafter enlist in or enter the armies of the United States * * * or in the United States Navy or Marine Corps, or in the United States Coast Guard, or (2) who has served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States * * *" and (3) "any alien serving in the military or naval service of the United States during the time this country is engaged in the present war," and (4) "any alien declarant who has served in the United States Army or Navy, or the Philippine Constabulary, and has been accepted for service in either the military or naval service of the United States * * *." (See Appendix, p. 20.) These classes of aliens are made the special beneficiaries of the first paragraph of the Act of May 9, 1918, in that they are exempted from the five years' residence requirement contained in the same section of the Naturalization Act to which the Act of May 9, 1918, is amendatory. In the first three classes no proof of residence is required; in the fourth class, proof of three years' residence is required.

Consonant with the true office of a proviso to qualify or restrict or condition what has gone before, it is argued that the foregoing classes of aliens are the only aliens subject to the restrictions and inhibitions of the proviso in question. If this contention were sound, the proviso could apply only to

the fourth class, because it is the only class of whom any residence at all is required.

Besides, it is too plain for argument that this proviso dealing with service on foreign vessels has no relation whatever to the other special cases of military and naval service.

The words "such aliens" in the second clause of the proviso evidently relate to the aliens serving on foreign vessels, mentioned in the preceding clause.

There can be no reasonable doubt that the language of the proviso in question would include the petitioner if it had been enacted as an independent statute. Its effect is just the same, it is believed, despite the fact that it is brought into the Act of June 29, 1906, in the form of a proviso. As said in the case of *United States* v. *Whitridge*, 197 U. S. 135, 143: "While no doubt the grammatical and logical scope of a proviso is confined to the subject matter of the principal clause, we can not forget that in practice no such limit is observed," citing *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 181, where it is stated that the word "provided" may have "no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, * * * simply serving to separate or distinguish the different paragraphs or sentences." Provisos have frequently been held to bring in new and independent matter rather than to limit or condition what has gone before. *United States* v. *Babbit*, 1 Black 55; *United States* v.

Scruggs Dry Goods Co., 156 Fed. 940, 942; 25 R. C. L. 985.

The practice of Congress in this regard is so familiar that it is unnecessary to cite the innumerable instances that are available. The very Act and section here under consideration contains an example of a general enactment in the form of a proviso. The proviso immediately before the proviso here in question reads:

> *Provided*, That it shall not be lawful to make a declaration of intention before the clerk of any court on election day or during the period of thirty days preceding the day of holding any election in the jurisdiction of the court. (40 Stat. 544; U. S. C. Title 8, sec. 374.)

It would be manifestly absurd to hold that this proviso, last quoted, applies only to the classes of aliens mentioned in the immediately preceding context of the Act of May 9, 1918. *Petition of MacKinnon*, 21 F. (2d) 445. See also House Report 502, 65th Cong., 2d Session; Congressional Record, Vol. 56, part 6, page 6022.

The petitioner argues that the other provisions of the Act of May 9, 1918, show a purpose to liberalize the naturalization laws, and therefore this proviso should not be construed to restrict the privilege. True, the Act does show liberality to those in the military or naval service of the United States and those in the American merchant marine, but that is no reason why Congress may not have in-

tended to make the naturalization laws less liberal to those serving in foreign vessels. Indeed, this proviso, construed as we contend it should be, is in accord with the purpose of the Act, by giving alien seamen having domiciles in the United States an inducement to service in vessels of American registry rather than in foreign ships.

The courts have generally held, as petitioner asserts, that domicile or residence for naturalization purposes may be maintained unbroken by temporary absences from the territorial limits of the United States, and have applied that rule to seamen.

United States v. *Rockteschell,* 208 Fed. 530.

In re Schneider, 164 Fed. 335.

The courts, however, have had some difficulty in applying the naturalization laws to cases of extended absence from the United States during the five years immediately preceding the filing of the petition. Although by maintaining here a place of abode and having an intention to return an absent alien may have a residence here, extended absence deprives him of the opportunity of learning about our institutions and becoming attached to the principles of the Constitution, and also makes it difficult for resident witnesses to qualify to testify as to the applicant's qualifications. See *In re Aquino,* 24 F. (2d) 759; *Petition of Schneider,* 19 F. (2d) 404; *United States* v. *Kummer,* 300 Fed. 106.

An alien, although technically domiciled in the United States, who spends most of his time outside of the United States serving on foreign vessels, is not in good position to learn about our institutions or prepare himself for citizenship, and it was not unreasonable for Congress to provide that he should not be credited with residence for naturalization purposes while serving on a foreign vessel. Besides, the fact that prior to the passage of the Act of May 9, 1918, the courts had held that an alien seaman having a residence or domicile in the United States did not lose it, for naturalization purposes, by absence on voyages in foreign vessels hurts instead of helps the petitioner's argument. It explains what Congress had in mind and intended to accomplish by this proviso. The phrase "continuous or broken" in the proviso confirms this.

The last contention of the petitioner rests on the use of the word "secure" in the clause "said aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry." The argument is that this relates only to initial acquisition of a residence, and that if the alien seaman acquires a residence here in the first instance, while not in the foreign merchant marine, his subsequent service on foreign vessels is immaterial. The petitioner strains the findings of fact too far in applying his theory. The findings do not fairly justify the claim that the petitioner established his residence first and afterwards entered

service on foreign vessels. They do not negative the possibility that he was in the service of the United Fruit Company prior to his arrival. The inference is that he has been in that service from the moment of his arrival, and that if he entered it upon his arrival, his obtaining a residence and his entry into that service were simultaneous. However, the case should not turn on any such narrow ground. We have no interest in maintaining it. Congress never intended to provide that an alien seaman acquiring residence at a period when not serving in a foreign merchant marine could the next day enter that service and remain in it without losing his residence for naturalization purposes, but that if residence here were acquired the day after he entered service on foreign vessels it should not be considered residence for naturalization purposes.

The statute is awkwardly worded, but its reasonable meaning is that residence, in the ordinary legal sense, shall not be considered residence for naturalization purposes while the alien is serving on vessels of foreign registry.

II

THE REASONING OF THE COURTS BELOW IS MORE PERSUASIVE THAN THAT IN THE CONFLICTING DECISION IN UNITED STATES *v.* NICOLICH, 25 F. (2d) 245

In *United States* v. *Nicolich*, 25 F. (2d) 245, the United States Circuit Court of Appeals for the Fifth Circuit reached a conclusion in conflict with

that of the Circuit Court of Appeals for the First Circuit in this case.

The opinion in the Fifth Circuit refers to the decision of the District Court as well-reasoned. That opinion in the District Court is reported as *In re Nicolich*, 17 F. (2d) 611. It disposes of the proviso here in question by the assertion that it relates "specifically to the particular classes of aliens defined therein, viz, Filipinos, Port Ricans, or aliens in the service of Army or Navy, Marine Corps, Coast Guard, or merchant marine." The District Court failed to point out any relation between the subject matter of the proviso and the specific cases mentioned in the preceding part of the new subdivision. We have dealt with this point above.

The Circuit Court of Appeals for the Fifth Circuit, in its opinion in the *Nicolich case*, gives no satisfactory reasons for its conclusions, nor did it, in rejecting the construction of the proviso we contend for, give any other meaning to its words. It asserted that the proviso related only to the specific classes of cases mentioned in the immediate context in the new subdivision. It has already been shown that the proviso, dealing as it does with service on foreign merchant vessels, has no relation to the cases mentioned earlier in the subdivision of service in the Army, Navy, Marine Corps, or American Merchant Marine. The Fifth Circuit's opinion also states that the proviso is merely declaratory of existing law and inserted out of abundance of

caution. We have already dealt with these claims in subdivision I of this brief. Certainly the clause "such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry" is new. The court of the Fifth Circuit also said that the effect of the proviso contended for by the United States would be retroactive. As we construe it, no retroactive effect would have resulted in the *Nicolich case*. The petition for naturalization in that case was filed October 27, 1925. Although the seaman had entered the United States in 1914, the five-year period in question was subsequent to October 27, 1920. The proviso had been enacted in 1918. It operated only on service in foreign vessels after its passage.

In *United States* v. *Habbick*, 287 Fed. 593, it was held that where none of the applicant's service on foreign vessels occurred after the passage of the Act of May 9, 1918, the proviso had no application. There is no reason to question the soundness of that decision.

Neither the decision of the District Court nor that of the Circuit Court of Appeals, in the *Nicolich case*, is persuasive.

The dissenting opinion in the present case, speaking of the proviso, says (R. 13):

> It simply limits the new grant, grounded on war service, to American registry.

Of course, there was no new grant for service on American merchant vessels. The right to natu-

ralization based on such three-year service had been in the Act of June 7, 1872 (c. 322, sec. 29, 17 Stat. 262, 268) and R. S. 2174.

The decisions in *Petition of MacKinnon*, 193 App. Div. 893, and in *Petition of MacKinnon*, 21 F. (2d) 445, are well reasoned.

III

THERE IS NOTHING IN THE CONGRESSIONAL RECORD OR COMMITTEE REPORTS TO JUSTIFY OVERTURNING THE DECISION BELOW

The petitioner has quoted at length from the debates on the Act of May 9, 1918. Nothing is presented which throws any special light on this proviso. The Members of Congress had their attention directed to the clauses granting special privileges in naturalization to those in our military or naval service, and what they said was with those provisions in mind.

The Report of the Senate Committee said (Report No. 388, 65th Cong., 2d Session, page 4):

> It also restricts and prohibits the recognition of service by aliens upon vessels of alien registration as residence within the United States. Because of the exemption to aliens serving on vessels of the American merchant marine from the general provisions of the law, the courts have in many cases admitted aliens to citizenship after their declarations of intention although all the time preceding their admission to citizenship and, thereafter also, they have been serving on merchant vessels of foreign nations.

The Report of the House Committee said (Report No. 502, 65th Cong., 2d Sess., page 2):

> * * * The subdivision also prohibits the naturalization of aliens serving on vessels of foreign registry, this construction having been maintained by some courts in view of the provisions of section 2174, which recognizes service of aliens on vessels of American registry. * * *

These statements are less clear than the proviso. They do not aid materially in its construction, even if there be ambiguity justifying resort to the proceedings in Congress.

CONCLUSION

It is respectfully submitted that the decision below is sound and should be affirmed.

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DECEMBER, 1928.

APPENDIX

Act of May 9, 1918, c. 69, "An Act to amend the naturalization laws and to repeal certain sections of the Revised Statutes of the United States and other laws relating to naturalization, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section four of the Act entitled "An Act to establish a Bureau of Immigration and Naturalization and to provide a uniform rule for the naturalization of aliens throughout the United States," approved June twenty-ninth, nineteen hundred and six, be, and is hereby, amended by adding seven new subdivisions as follows:

[1]

Seventh. Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation

for reenlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the Regular or the Volunteer Forces, or the National Army, the National Guard or Naval Militia of any State, Territory, or the District of Columbia, or the State militia in Federal service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who has served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirement of this subdivision it is shown that such residence can not be established; any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration

of intention and without proof of the required five years' residence within the United States; any alien declarant who has served in the United States Army or Navy, or the Philippine Constabulary, and has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon proof of continuous residence within the United States for the three years immediately preceding his petition, by two witnesses, citizens of the United States, and in these cases only residence in the Philippine Islands and the Panama Canal Zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for purposes of naturalization; and any alien, or any person owing permanent allegiance to the United States embraced within the subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding the limitation upon the jurisdiction of the courts specified in section three of the Act of June twenty-ninth, nineteen hundred and six, provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination hereby required before filing his petition for natu-

ralization in the office of the clerk of the court, and in each case the record of this examination shall be offered in evidence by the representative of the Government from the Bureau of Naturalization and made a part of the record at the original and any subsequent hearings; and, except as otherwise herein provided, the honorable discharge certificate of such alien, or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or by the masters of said vessels, shall be deemed prima facie evidence to satisfy all of the requirements of residence within the United States and within the State, Territory, or the District of Columbia, and good moral character required by law, when supported by the affidavits of two witnesses, citizens of the United States, identifying the applicant as the person named in the certificate or honorable discharge, and in those cases only where the alien is actually in the military or naval service of the United States, the certificate of arrival shall not be filed with the petition for naturalization in the manner prescribed; and any petition for naturalization filed under the provisions of this subdivision may be heard immediately, notwithstanding the law prohibits the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the court. Any alien who, at the time of the passage of this Act, is in the military service of the United States, who may not

be within the jurisdiction of any court authorized to naturalize aliens, may file his petition for naturalization without appearing in person in the office of the clerk of the court and shall not be required to take the prescribed oath of allegiance in open court. The petition shall be verified by the affidavits of at least two credible witnesses who are citizens of the United States, and who shall prove in their affidavits the portion of the residence that they have personally known the applicant to have resided within the United States. The time of military service may be established by the affidavits of at least two other citizens of the United States, which together with the oath of allegiance, may be taken in accordance with the terms of section seventeen hundred and fifty of the Revised Statutes of the United States after notice from and under regulations of the Bureau of Naturalization. Such affidavits and oath of allegiance shall be admitted in evidence in any original or appellate naturalization proceeding without proof of the genuineness of the seal or signature or of the official character of the officer before whom the affidavits and oath of allegiance were taken, and shall be filed by the representative of the Government from the Bureau of Naturalization at the hearing as provided by section eleven of the Act of June twenty-ninth, nineteen hundred and six. Members of the Naturalization Bureau and Service may be designated by the Secretary of Labor to administer oaths relat-

ing to the administration of the naturalization law; and the requirement of section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under section fifteen of the Act of June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes at Large, part one, page five hundred and ninety-six), may also be performed by the Commissioner or Deputy Commissioner of Naturalization: *Provided*, That it shall not be lawful to make a declaration of intention before the clerk of any court on election day or during the period of thirty days preceding the day of holding any election in the jurisdiction of the court: *Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry.

(The other parts of the Act are not pertinent and are here omitted.)

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